

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF LOUISIANA,
IN THE
EASTERN DISTRICT, AT NEW ORLEANS,
MAY, 1843.

PRESENT:

HON. FRANÇOIS XAVIER MARTIN.
HON. HENRY A. BULLIARD.
HON. ALONZO MORPHY.
HON. EDWARD SIMON.
HON. RICE GARLAND.

ISAAC DUNBAR v. JAMES ARMOR.

One who pays a draft which has been fraudulently raised to a larger amount, must bear the loss of the difference between the amount so paid, and that for which the draft was given.

APPEAL from the District Court of the First District, *Buchanan, J.*

Preston, for the plaintiff.

L. Peirce, for the appellant.

MARTIN, J. The defendant resisted the plaintiff's claim, for the proceeds of cotton sold for the latter, on an allegation that he had paid his draft for the amount of it. There was judgment against him, and he has appealed. It appears that the plaintiff drew on the defendant for sixty dollars, but the draft was altered

Bayne v. Fox.—Fox v. Bayne.

so as to be for six hundred and sixty, the words *six hundred and* being placed before the word *sixty*, and the figure 6 before the figures 60; and that the defendant, unconscious of the forgery, paid six hundred and sixty dollars. It is insisted, that the plaintiff probably drew the bill so negligently, as to cause the fraud to be imagined, and successfully used against the defendants; and it is further urged, that the bill was really drawn for six hundred and sixty dollars. The case presents a simple question of fact, to wit: the forgery of the bill paid by the defendant. The First Judge has determined against him, and we see no ground on which we may relieve him.*

Judgment affirmed.

WILLIAM BAYNE v. BERNARD FOX.

BERNARD FOX v. WILLIAM BAYNE.

As a general rule, Courts of Probate have exclusive jurisdiction of all claims for money against successions, administered by executors, curators, &c. (C. P. art. 924, § 13); and when a defendant dies during the pendency of a suit against him for a sum of money, the jurisdiction of the ordinary tribunals ceases, and the case must be transferred to the Probate Court of the parish where the succession is opened, to be there proceeded in. The object of the law is to bring before the Probate Court all the claims which, being subject to classification, are to be paid by the administrators under the control and supervision of that court. But the law does not extend to cases where the claim against the succession is set up by reconvention or compensation, or in which the parties have instituted separate actions against each other, which have been subsequently consolidated. In such cases, the jurisdiction of the ordinary tribunals will be maintained, where the original action was within their jurisdiction. The actions are indivisible, and must be tried together in the same court.

APPEAL from the District Court of the First District, *Buchanan, J.*

J. Mitchell, for the appellant.

Elmore and W. W. King, contra.

* The judgment was for \$600, the amount claimed, with interest, from judicial demand.

SIMON, J. The first of these cases was heretofore before this court, and was remanded for a new trial, for the purpose of reinstating the reconventional demand set up by the defendant, with instructions to the lower court, not to reject the evidence of the defendant, offered to support his said reconventional plea. 18 La. 80. It was tried, *de novo*, before a jury, who returned a verdict in favor of the plaintiff, for the sum of \$707, and the defendant, after an unsuccessful attempt to obtain a new trial, took this appeal.

Our attention has been called to a question of jurisdiction, raised by the defendant's counsel, on the suggestion, that this suit having been instituted on an open account in the District Court, and the defendant having died during its pendency before this court on a former appeal, his executrix was made a party; and that at the time when the case was remanded for a new trial to the District Court, said court had lost its jurisdiction of the matter in dispute, which properly and exclusively belonged to the Court of Probates. He contends that the judgment appealed from is a mere nullity, as it was rendered by an incompetent tribunal.

This objection was not raised in the court below, nor was this suggestion made to us at the time of our first judgment. On the contrary, the question then before us was, whether the defendant's reconventional plea, which had been rejected by the inferior tribunal, should be reinstated; and, in that matter, the defendant had assumed the character of plaintiff. His reconventional demand amounted to \$1880 50, whilst that of the plaintiff was only \$1157 25. Thus, in this state of the pleadings, the plaintiff, Bayne, became really the defendant in the action, and the more particularly so, as the reconventional demand set up originally by Fox, who had died during the pendency of the appeal, had been made the subject of a separate action, which, on the second trial below, was consolidated with the first suit; and both having been tried together, the verdict of the jury and the judgment of the court were rendered on the two demands.

It is true, as a general rule, that Courts of Probate have exclusive jurisdiction of all claims for money against successions administered by an executor. Code of Practice, art. 924, No. 13. 2 Mart. N. S. 238. 10 La. 219. And that under the jurispru-

dence of this court, when the defendant dies during the pendency of a suit against him for a sum of money, in certain cases the general jurisdiction of the ordinary tribunal ceases, and the case is to be transferred to the Probate Court of the parish where the succession was opened, in order to be there proceeded in according to law. 11 La. 360. 13 La. 377. But in this case, how can it be said that the District Court was without jurisdiction? The separate action of the defendant, Fox, which was consolidated with the suit of Bayne against him, and which, being for the sum of \$1880 50, was made the basis of his reconventional demand, sustained by us in our last judgment, was properly prosecuted by his executrix in the District Court, against Bayne, in opposition to the claim by him set up against the deceased, for the sum of \$1157 25. With regard to this cross action, the District Court had clearly jurisdiction; and yet, the two claims were to be tried together, not only because the defendant's reconventional plea was opposed as an exception, but also because, being the subject of a distinct and separate suit, it was consolidated with that of the plaintiff. So the two parties were respectively plaintiffs against each other, and their respective claims could not any longer be tried separately. Code of Practice, art. 377. But one of the parties died during the pendency of the suits, and we are called again to divide the controversy, to dismiss one of the actions, and, we suppose, to maintain the other. Can this be done? The defendant in one of the suits, is plaintiff in the other, and his demand is for a greater amount than that of the other party. It is obvious that if this suit stood alone, as originally brought by Fox, and revived after his death in the name of his executrix, no question could arise as to the jurisdiction of the District Court, and the two claims would be properly inquired into, before the ordinary tribunals, and prosecuted to final judgment in favor of either of the parties. Does the circumstance of the two suits having been consolidated, make any difference as to the question of jurisdiction, after the death of one of the plaintiffs? We think not. The law that gives exclusive jurisdiction to Courts of Probate to take cognizance of all claims for money against successions administered by curators, executors, &c., was intended to bring before the said courts all the naked claims, which, being

Dowlin v. The New Orleans and Nashville Rail Road Company.

subject to classification, are to be paid by the administrators under the control and supervision of said courts; but we cannot understand it to extend to cases, in which the claim against a succession is set up by reconvention or compensation, or in which the parties have instituted against each other separate actions, which are subsequently consolidated. In such cases, we think the best rule to adopt is, to maintain the jurisdiction of the ordinary tribunals, when the original action is within the limits of their jurisdiction. It is clear, that the actions cannot be divided; that they must be tried together in the same court; and that a contrary rule would not only have the effect of subjecting the parties to two jurisdictions, to two litigations, but would also be followed by the greatest inconveniences, amounting in some cases to a denial of justice.

On the merits, we have attentively examined the evidence adduced by the parties, in support of their respective claims, and it has not appeared to us that any error has been committed. The first verdict was for \$800, in favor of Bayne, and the second, which is now under our consideration, is for \$707. The latter verdict is sufficiently supported by the evidence; and at any rate, we have not been able to discover any reason why it should require our interference.

Judgment affirmed.

HUGH MONTGOMERY DOWLIN v. THE NEW ORLEANS AND NASHVILLE RAIL ROAD COMPANY.

Where a purchaser at a credit sale, availed himself of the privilege of paying cash, on being allowed a deduction at the rate of eight per cent per annum, from the price for such advance, this circumstance will not entitle him, on obtaining a rescission of the sale, to claim interest at that rate.

APPEAL from the District Court of the First District, Buchanan, J.

G. Schmidt, for the plaintiff.

Dowlin v. The New Orleans and Nashville Rail Road Company.

C. Woodruff, for the appellants.

MARTIN, J. The New Orleans and Nashville Rail Road Company is appellant from a judgment, by which the plaintiff has recovered the price of several squares of ground in the town of *Uncle Sam*, the sale of which has been rescinded on account of the Company's failure in fulfilling the conditions of the sale. The sale took place in January, 1837, on a plan which promised that the rail road should traverse the town, which was to be embellished by a theatre, hotel, Catholic, Episcopal, Congregational, Baptist, Presbyterian, Methodist, and Free churches, two public squares, a stock fair, and a canal and park. By a printed prospectus, the Company engaged to apply one-half of the proceeds of the sale to establish a water power within the town; one-tenth for the building of a hotel; another tenth for a college for at least one hundred pupils; the same sum for a bridge over the river Tangipao; and the same sum in aid of a cotton factory working at least 10,000 spindles. The plaintiff stated, and proved, that no part of the hopes thus excited was realized; that the Company neglected, except in a very few instances indeed, to collect the price of the lots sold, giving indeterminate extensions of credit, and, in several instances, authorizing the cancelling of sales, thus disabling itself from complying with the terms on which purchasers had bought; so that every hope to have the rail road extended to the town, and any of the promised improvements realized, has vanished. The Company has employed no counsel to show us on what grounds it has built its hopes of relief at our hands. We have not been able to discover any. The plaintiff's counsel has prayed for the amendment of the judgment, by allowing him interest at the rate of eight per cent, instead of legal interest, on the ground that he availed himself of the faculty, the Company had held out to him, of paying the price at once, in cash, on being allowed a discount at the rate of eight per cent a year. It does not appear to us, that this circumstance authorizes the claim.

Judgment affirmed.

ABRAM M. FELTUS v. M. G. ANDERS and others, Master and
Owners of the Steamer Swallow.

The act of 25th March, 1840, chap. 80, relative to the transporting of slaves out of the State, against the will of their owners, applies to all slaves received on board of a steamer, or other vessel, within this State, without the written consent of their owners, wherever the latter may reside, whether in, or out of this State.

Under the first section of the act of 25th March, 1840, the testimony of a witness employed on any steamer or other vessel, on board of which a slave shall have been found, without the written consent of his or her owner, is inadmissible to destroy the legal presumption, established by that act, that the master and owners have received, or hidden, or suffered such slave to remain on board with the intention of depriving the owner thereof, or of transporting him or her out of the State, or from one part thereof to another; but it is admissible to disprove any statements in relation to the facts out of which this presumption grows, such as the finding of the slave on board, the taking from some point within the State, &c.

APPEAL from the District Court of the First District, *Buchanan, J.*

W. J. Vason, and *P. W. Farrar*, for the plaintiffs.

L. Elwyn, for the appellants.

MORPHY, J. The defendants, master and owners of the steamboat Swallow, are appellants from a judgment condemning them, *in solido*, to pay a fine of \$500, under the act of 1840, amending the various acts passed for the purpose of preventing slaves from being transported, or conducted out of the State, against the will of their masters. It is urged by their counsel, that as the plaintiff is a resident of Mississippi, and his slave has not been taken out of that State, he cannot invoke the law of 1840, which applies only to slaves belonging to citizens or residents of Louisiana. Had plaintiff's slaves been taken or received on board of the Swallow in the State of Mississippi, it is clear that the act would have been no violation of our law; but the evidence fully establishes, that the boy, who was found by an agent of the plaintiff on board of this boat at Natchez, without the written consent of his master, was taken or received on board from some point not exactly shown, but within the limits of this State. He was seen on board, and recognized by a passenger, shortly after the boat had left the landing at Bayou Sara, on her way up the river; and the claim made

of the plaintiff's agent by the captain, for the passage money usually charged between New Orleans and Natchez, strongly implies, if it does not prove, that the slave was taken from the port of New Orleans, as charged in the petition. The law is general in its terms, and applies to all slaves received on board of a steamboat or vessel within this State, without the written consent of their owners, whatever may be the residence of the latter.

Our attention was next called to a bill of exceptions taken to the opinion of the inferior Judge, excluding as a witness the clerk of the boat, who was offered to disprove the testimony of Foster, plaintiff's principal witness, to corroborate that of Yerby and Williams, two of defendants' witnesses, and to sustain the defence generally. The first section of the act of 1840, establishes the presumption in relation to slaves found on board of steamboats, or other vessels, without the written consent of their owners, that the master and owners thereof have received such slaves on board, or have hidden them, or have suffered them to remain on board, with the intention of depriving their masters of them, and of transporting them out of the State, or from one part of the State to another; and it provides, that this presumption of the law shall not be destroyed but by the testimony of at least two witnesses, not employed on board of said vessel, and by corroborating circumstances. See acts of 1840, p. 89.

It appears to us, that the testimony of this witness was properly excluded, so far as it went to show circumstances tending to do away with, or destroy, the legal presumption established by the statute, because he was a person employed on board; but his testimony was clearly admissible to disprove any statements made in relation to the facts out of which this presumption grows, such as the finding of the slave on board, his being taken from some point within the State, &c. On examining the testimony excluded, which comes up annexed to the bill of exceptions, we do not find that it controverts any of the facts which form the basis of the presumption established by the statute; and we disregard all that portion of it which goes to show, that the intention of the defendants was not that implied by the law from such facts. On the merits, the case appears to us fully made out.

Judgment affirmed.

ANNETTE LAYRE v. JEAN PASCO.

The State can only take a succession where there is no one entitled to the inheritance, or where it is not claimed by any one having a right thereto. C. C. 477, 911, 917, 923. Such was the case under the Code of 1808, and under the Spanish laws.

Natural brothers and sisters will inherit from each other, where their father and mother died before the child from whom the estate descends. C. C. 917. Article 923 of the Civil Code does not exclude the idea of natural brothers and sisters being entitled to inherit. It must be construed with reference to the preceding articles. Arts. 923 and 917 must be regarded as one continuous act of legislation *in pari materia*.

Where a party has been put in possession of a succession, as testamentary heir, by a decree of the Court of Probates, that court is divested of all control over the estate; and one who claims the property as the heir at law of the deceased, must proceed before the courts of ordinary jurisdiction. Nor is it requisite, before instituting such revendicatory action, that the claimant should be recognized as heir by the Probate Court; this is only required while the succession continues under the supervision of the court by which the executor, administrator, or curator was appointed.

APPEAL from the Parish Court of New Orleans, *Maurian, J. Bodin and J. Seghers*, for the plaintiff.

R. Preaux, for the appellant.

SIMON, J. The plaintiff alleges, that she is the sole heir of Marie Rose Layre, her sister, who died without leaving any descendants or ascendants, legitimate or natural. That the succession of the deceased was opened before the Court of Probates of the Parish of Orleans, and is composed of certain personal and real property, which is in the possession of the defendant, who pretends to be the owner thereof, under a will of the deceased, which, for certain reasons stated in the petition, is null and void. She prays to be recognized and decreed to be the sole and lawful heir of her sister; that the will be declared null and void; and that the defendant be condemned to restore the possession of the property belonging to the succession, &c.

The defendant first excepted to the jurisdiction of the court; but his exception was overruled. He afterwards filed an answer to the merits, alleging that the plaintiff has no right of

action, because she is not a legitimate relation of the deceased, and has never been recognized as her heir. He further denies all the allegations contained in the petition.

Judgment was rendered below in favor of the plaintiff, for the lot of ground and improvements thereon erected, described in the plaintiff's petition; from which judgment, after having vainly attempted to obtain a new trial, the defendant has appealed.

One of the grounds on which the will is attacked in the petition, is, that the deceased could not, under our laws, make any donation, whether *inter vivos*, or *mortis causa*, to the defendant, as the deceased and the defendant had lived together, up to the time of the death of the deceased, in open concubinage.

The claim of the plaintiff appears to be resisted on three distinct grounds, which have been strenuously urged before us on the argument of this cause. It is contended:

1st. That the plaintiff, who is only the natural sister of the deceased, is by law excluded from setting up any claim to her inheritance.

2d. That said plaintiff never was legally and regularly recognized as the heir of the deceased before the Court of Probates; this being a prerequisite to her instituting any action for the recovery of the property belonging to the succession.

3d. That the concubinage alluded to in the 1468th article of the Civil Code is therein qualified, and required to be an open concubinage; and that, in this case, no such open concubinage has been established.

I. In support of his position, the defendant's counsel has relied upon the 923d article of the Civil Code, which provides, that "in defect of lawful relations, or of a surviving husband or wife, or acknowledged natural children, the succession belongs to the State." Hence, he has argued that the plaintiff is excluded from the right of inheriting from her natural sister, since the law clearly indicates that the State is to take the succession, in the absence of those who are therein denominated, among whom natural brothers and sisters are not included. This, it seems to us, is a *non sequitur*. If we refer to the 911th article of the same code, we

find, that "when the deceased has left neither lawful descendants, nor lawful ascendants, nor collateral relations, the law calls to his inheritance either the surviving husband or wife, or his or her natural children, or *the State, in the manner and order hereafter directed.*" Here again, there is no mention made of natural brothers and sisters; and yet, among the following articles, which establish *the manner and order* in which the right of inheritance is to be regulated, we come to the 917th article which says: "if the father and mother of the natural child died before him, *the estate of such natural child shall pass to his natural brothers and sisters, or to their descendants.*" These articles of the Louisiana Code, which are *verbatim* the same as those in the Code of 1808, pp. 154 and 156, articles 43, 49, and 51, were originally borrowed from the Spanish laws, which contain the same provisions. In the law 6th, tit. 13, part 6th, corresponding to our articles 911 and 923, it is said, that the estate will belong to the King, if the deceased leaves no one of the relations therein denominated, (among whom natural brothers and sisters are not comprised); and in the law 12th, of the same title, it is provided in what manner natural brothers may inherit among themselves. This law corresponds to our 917th article. Now, with regard to the right of the State to inherit, in the absence of the legal heirs of the deceased, the article 923 does not stand alone. We have article 477 of our Code, in which the rule is broadly stated to be, that "*the successions of persons who die without heirs, or which are not claimed by those having a right to them, belong to the State.*" From all these different provisions it is clear, that the intention of the Legislature was, that the State should only take, where there was no one legally entitled to claim the inheritance, or when such inheritance was not claimed by any one having a right thereto. It was so under the Spanish laws, as well as under our former code; and the re-enactment of its articles in our present legislation shows, that it was so understood by the jurists who were charged to prepare our codes. It seems to us, that the article 923 does not exclude the idea of natural brothers and sisters being entitled to inherit. That article is included in the same chapter with the 917th, under the title of "*Irregular Successions;*" and, as coming after all the previous provisions regulating the man-

ner and order in which the right of inheritance is to be exercised, it must be construed in reference to the preceding articles. This was recognized by this court in the case of *Laclotte v. Labarre*, 11 La. 180, in which it was held, that both articles may be regarded as one continuous act of legislation *in pari materia*.

We have been referred to the case of *Victor v. Tagiasco*, 6 La. 644, in which it was urged, that this court seems to have entertained a different opinion; and the counsel, relying upon its application to the present case, confidently called upon us to overrule the decision reported in 11th La., as being contrary to a previously settled jurisprudence. The counsel must have been laboring under a great mistake; for the case referred to, far from sustaining his pretensions, recognizes impliedly, if not expressly, the provision contained in article 917, and holds, that "if, in order to place either the surviving husband or wife in the situation the Legislature has clearly assigned them, *natural brothers and sisters, or their descendants, are, in certain cases, postponed to the former*, courts of justice merely comply with the will of the legislator, in giving to the surviving spouse his legitimate rank." This is very far from declaring, that natural brothers and sisters are not entitled to inherit.

II. This action may be considered as a petitory one, brought against a third possessor. The plaintiff must recover upon the strength of her title to the succession of her sister; and for that purpose, she must show that she is the natural sister of the deceased, and that the deceased left no lawful heir entitled to her inheritance. This has been done satisfactorily. The evidence establishes, that the defendant was put in possession of the estate, as testamentary heir, by a decree of the Court of Probates. It was, therefore, useless for the plaintiff to attempt to demand the possession of the property of the succession, since it had been delivered to the defendant, and the estate had ceased to be under the control and supervision of the Probate Court. Her application to the Court of Probates would have had no object, as that court was no longer possessed of any power over the succession, and, consequently, no order could have been rendered to take it out of the defendant's hands. The action of revendication was left to the plaintiff, and we are not prepared to say, that previous to

Gillett and others v. Deranco.

her instituting it, it was necessary that she should have been recognized as heir by the Probate Court. This requisite is only to be complied with, as long as the succession is under the supervision of the court by which the administrator, curator, or executor has been appointed, as it seems to us, that after delivery to the heir who is apparently entitled thereto, it would be requiring a vain thing. *Lex neminem cogit ad vana.*

III. This is a question of fact, which is easily answered by the evidence. It is not necessary for us to enter into any detail of the disgusting facts disclosed by the testimony. To illustrate the immoral conduct of the defendant, it suffices to say, that the allegation of concubinage is clearly made out, and that the record shows, satisfactorily, that the deceased and the defendant lived together in open and notorious concubinage. The English text of art. 1468 of the Civil Code is fully applicable.

With regard to the exception of jurisdiction: it was not insisted on by the defendant's counsel, and was properly overruled by the Judge, *a quo*. The rule is well established, that "when an action of revendication is instituted by an heir at law, against the testamentary heir or universal legatee, who has been put in possession of the estate, and who sets up the will as his title to the property, District Courts are the proper tribunals in which such suits must be brought." *Robert v. Allier*, 17 La. 15.

Judgment affirmed.

FRANÇOIS GILLETT and others v. CHARLES DERANCO.

One who has been employed by the partners in liquidation of the affairs of a commercial partnership, cannot claim a commission on the value of goods divided in kind among the partners; but he is entitled to a compensation proportioned to the trouble to which he was subjected in making such division.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Benjamin*, for the plaintiffs.
Bodin and Roselius, for the appellants.

MARTIN, J. The defendant is appellant from a judgment which rejects a part of his claim against the plaintiffs, who have prayed, that the judgment may be amended in their favor, on their complaint that it sustains claims of the defendant, which ought to have been rejected. The defendant was employed by the plaintiffs, in the liquidation of the affairs of a partnership which had existed between the latter. In rendering the account of his administration, the defendant charged a sum of about fourteen hundred dollars, for his trouble in dividing the goods of the partnership between its members, and nearly the same sum for his commission on the active debts of the partnership not recovered, the evidence of which he surrendered. On both these items he charged for his trouble a commission. This was objected to: the first item, on the ground that the division of the goods was made by him as the friend of one of the partners, jointly with another person as the friend of the other; that these operations employed him but for a short time, and were not attended by that responsibility which in mercantile affairs is the basis of the commission. The second item was opposed on the ground, that the debts uncollected, the evidences of which were surrendered, were worthless. The judgment does not enable us to ascertain the amount at which the First Judge valued the services of the defendant in dividing the goods, attending to the recovering of the debts uncollected, and in prosecuting suits and obtaining judgments on most of them. He certainly is not entitled to a commission on the division of the goods; but this operation must have been attended with a trouble which requires some compensation. Debts which finally can not be collected, require trouble and care in the attempt to realize or liquidate them. The sum allowed by the judgment, above the items of the defendant's account, which are not objected to, is not so large as to induce the belief that his services, in both these instances, have been excessively overrated, or insufficiently compensated.

Judgment affirmed.

EDWARD MALLARD v. MANUEL BORGES and others.

Action for compensation for services rendered as attorney in fact for defendants, in recovering the amount of a succession. Plaintiff had previously presented his claim in the form of an opposition to the account filed by the executor, to the Court of Probates before which the succession was opened, and judgment had been rendered against him, exception of *res judicata* being pleaded, founded on this judgment: *Held*, that the exception should be overruled. *Per Curiam*. The Court of Probates has jurisdiction of claims against the estates of persons deceased; but the plaintiff's was against the defendants, for services rendered after the death of their ancestor.

APPEAL from the District Court of the First District, *Buchanan, J.*

Larue and Preston, for the plaintiff.

Roselius, curator ad hoc, for the appellants.

MARTIN, J. The plaintiff claims one thousand dollars for his services, as the attorney in fact of the defendants, in supporting their claim to the estate of a deceased relation of theirs. The defendant besides the exception, *rei judicata*, pleaded the general issue. The exception was properly overruled. The plaintiff's powers having been revoked, another attorney in fact was appointed, by whom the succession was recovered in the Court of Probates, the plaintiff having intervened, and claimed one thousand dollars for his services, on which claim judgment was given against him. This is pleaded as *res judicata*, and the First Judge did not err in overruling the exception; as claims in the Court of Probates, are against the estates of deceased persons, and the plaintiff's was against the present defendants, for services rendered to them after the death of their ancestor.

In the argument, the plaintiff's claim has been opposed on the ground of excessive neglect, *crassa negligentia*, which is said to be equivalent to fraud. If this defence was intended, it ought to have been pleaded. The date of the power of the plaintiff does not appear in the record. It was presented to the Court of Probates, on the 10th of August, 1839. The present suit was brought on the 2d September, 1840. The proof of gross neglect, on the allegation of which, relief is sought at our hands, is not in

Barton v. Kirkman.

the record, and this ground of complaint is not shown to have been made in the court below. We see nothing that can authorize us to reverse the judgment, from which the defendants appealed, it being supported by legal evidence absolutely uncontradicted.

Judgment affirmed.

EDWARD HALL BARTON v. ELLEN KIRKMAN.

The use which the owner has intentionally established on a particular part of his property in favor of another part, is equal to a title, with respect to perpetual and apparent servitudes thereon. C. C. 763.

APPEAL from the Parish Court of New Orleans, *Maurian, J.*

Benjamin, for the plaintiff.

Elwyn, for the appellant.

SIMON, J. The plaintiff complains that, having purchased of the defendant one of her four lots, with all the improvements thereon erected, situated furthest from Natchez street, and adjoining the property of William Brand, together with *all the rights, ways, privileges and advantages* thereunto belonging, which property was delivered to him with doors opening into a certain yard, (described in the petition,) on the ground floor, and windows opening into it on the second and third stories, thus establishing in favor of the property by him owned *a servitude, on said yard* of way, use, light, and view, which servitude in its nature was real, apparent and continuous, and existed at the time of the sale and delivery; he was enjoying quietly all the advantages resulting from said servitude, when the defendant interrupted and impeded said quiet possession and enjoyment, by employing workmen who, under her control, and by her orders, closed up the doors which gave egress from his property into said yard, by building up a wall of bricks and mortar in the apertures, and building a shed against said doors, &c., causing him damage to the amount of three thousand dollars. He prays that the servitude may be re-

Barton v. Kirkman.

stored as it originally existed, with a perpetual injunction on the defendant from constructing any work, or doing any act which may impede or obstruct the use of the said yard, or the enjoyment of the servitude thereon; and for judgment against the defendant for \$3000 damages, &c.

The defendant pleaded the general issue, and judgment having been rendered against her, she has appealed.

The record is accompanied by a plan showing the situation of the premises, and the extent of the yard upon which the plaintiff claims his right of servitude.

It appears that the defendant, being the owner of a piece of ground situated at the corner of Natchez and Magazine streets, constructed thereon four three story brick buildings, and that for that purpose, the whole ground having been divided into five different lots, the buildings were erected on four of them, leaving the fifth portion vacant to serve as a common yard for the four buildings. According to the contract for building the four houses, which contract was produced in evidence, they were built with doors opening from each lower story into the yard, and windows opening from all the upper stories into said yard. The property was in that situation, when one of the lots and improvements was sold and delivered by the defendant to the plaintiff.

This case presents a mere question of fact; and from an attentive examination of the evidence, we are satisfied that the plaintiff has satisfactorily made out his case. He has shown that the whole lot belonged to the same proprietor, and that the things have been placed by her in the situation from which the servitude, by him claimed, results. It is clear that the servitude is within the provisions of arts. 763 and 764 of the Civil Code, and that the defendant, by whom it was established, has now no power to destroy it. The use, says the law, which the owner has intentionally established on a particular part of his property in favor of another part, is equal to a title, with respect to perpetual and apparent servitudes thereon.

Judgment affirmed.

JOSEPH E. BELL v. SAMUEL DOWLY and Wife.

Where the vendor remains in possession of the thing sold, it will be presumed that the sale was simulated; and, with respect to third persons, the parties must prove that they are acting in good faith, and establish the reality of the sale. C. C. 2456.

APPEAL from the District Court of the First District, *Buchanan, J.*

Wills and M Kinney, for the appellants.

Dugué, for the defendants.

MORPHY, J. The petitioner claims, as his property, the contents of a grocery shop situated at the corner of Levée and St. Andrews streets in the city of Lafayette, of which the defendants have possession, and claim ownership under a probate sale made to them in December, 1840, of the same, as belonging to the succession of the late Marie Canaller. There was a judgment below in favor of the defendants, and the plaintiff has appealed.

In support of his claim, he exhibited, on the trial, a sale under private signature, bearing date the 25th of May, 1839, and written at the foot of a list of the articles in the shop which belonged to the deceased, Marie Canaller, and which she had purchased from the estate of her father, S. Canaller. It is in the following words, to wit:

"I hereby transfer to J. E. Bell all the articles enumerated in the above bill, with all the stock in trade added to the shop since its purchase for his benefit, he paying all the debts of the concern which have been contracted under the name of Marie Canaller, with the last payment for the purchase of the shop. Said Bell agrees to pay Marie Canaller five hundred dollars on the first of December, 1839, in consideration of her interest.

"MARIE CANALLER.

"Witness, J. MARTIN."

The evidence shows: That Marie Canaller, who was a colored woman, had been living in open concubinage with the plaintiff, for several years previous to her death, which happened some time in September, 1840. That notwithstanding this sale to Bell,

Bell v. Dowly and Wife.

Marie Canaller continued in possession of the property up to the time of her death, paying the rent of the store, the license, and other expenses of the shop. That her name remained at the door, and was taken down and replaced by that of Bell only a few days before her death, and while she was confined to her bed by her last illness, which lasted several weeks. That from the time when Bell went to live with the deceased, he occupied himself about the house, went to market, and attended the shop for the deceased. That he was absolutely destitute of any means to purchase the store, having failed shortly before, and being then in the prison limits. One of the witnesses says that Bell was considered as a *loafer*, kept and entertained by Marie Canaller. Other witnesses say that after December, 1839, Bell appeared to act as master of the shop, bought provisions, paid accounts, &c. It does not appear from the record, that when the Parish Judge affixed the seals on the effects of Marie Canaller, and afterwards included in the inventory of her succession the property now claimed, the plaintiff, who was living in the house and whose name had a few days before been put on the door, made any opposition, protest, or claim. But one witness says that he appeared at the bar room when the sale was about to be made, said that the property was his, and forbade the sale, but that the Parish Judge went on, saying he would guarantee the sale to the purchaser. Article 2456 of the Civil Code provides, that when the seller remains in possession of the thing sold, the sale is presumed to be simulated; and, with respect to third persons, the parties must show that they are acting in good faith, and establish the reality of the sale. The plaintiff offered no proof whatever of his complying with the conditions of the sale, made to him in May, 1839. Under the circumstances, and the evidence which tended strongly to corroborate the presumption established by law, we do not think that the Judge erred in the conclusion at which he arrived.

Judgment affirmed.

ALEXANDER CALDWELL V. DUNCAN N. HENNER.

Where one claims, as the heir of his mother, against a third person in possession, property which belonged to the community of *acquêts* existing between his parents, he must show that his father had such a title, at the dissolution of the community, as would have enabled him, in his own right and as tutor of his son, to maintain a petitory action for the property; for if any contracts or engagements were entered into by the father, during the existence of the community, which were binding on him, showing that his apparent title was not a real one, whether evidenced by private writings shown to exist, and proved by extrinsic evidence to have a real date, or by authentic acts, they must have been binding on the community, and descended to the heir of the wife as a necessary burden upon his inheritance, estopping him from disturbing a title derived from the community.

Nothing in the laws of this State prohibits a party from holding in his own name lands belonging to another, subject to the order of the latter. Such an arrangement has no analogy to the *fidei commissum* abolished by the Civil Code. By the latter, the trustee is bound to retain for, and deliver to a third person, the thing confided to him, which is placed beyond the control of the person creating the trust.

Neither the wife, nor her heirs, are third persons as to the husband, in relation to acts done by him as the head of the community. Domestic papers admissible against the husband, are so against the wife, or her heirs.

APPEAL from the District Court of the First District, *Buchanan, J.*

Preston and A. Hennen, for the plaintiff.

Eustis and Grymes, for the appellant.

BULLARD, J. This is an action of slander of title. The plaintiff alleges that he is the owner and possessor of two city lots, at the corner of Dauphine and Canal streets, but that Duncan N. Hennen holds out to the public, that he has a just title to one undivided half of said lots, but refuses to bring suit to make good his pretended title.

The defendant, Duncan N. Hennen, by his answer in reconvention, asserts title to one undivided half of the lots in question, as the heir of his mother; averring, that the two lots belonged to the community of *acquêts* and gains, formerly existing between his mother, whose succession he has accepted, and his father, Alfred Hennen, by purchase at a sheriff's sale, about the 27th of July, 1813. That his mother departed this life in May, 1818, leaving the defendant her sole heir, then a minor; that his father

continued to administer his property as natural tutor ; that his title to said property has never been legally impaired or divested, either before or since he attained the age of majority ; and that, if any pretended alienations or transfers have at any time been made of said property, so as to affect the respondent's title thereto, the same were collusive and fraudulent.

The defendant, therefore, stands before the court as if he were plaintiff in a direct petitory action, and must make good his title. In order to do so, he must show that the two lots belonged to the community, in May, 1818 ; and that no valid alienation has since been made of them. Claiming, as he does, under the community, and under his father, as the head of that community, he must show that his father had such a title at the dissolution of the community, as would have enabled him, in his own right, and as tutor of his son, to maintain a petitory action for the lots against Paulding, who appears to have been then in possession, and from whom the plaintiff, Caldwell, derives his title. We concur with the counsel for the plaintiff, that this is the true question which the case presents ; and that the plaintiff in reconvention must show that his father had, at the moment the community was dissolved, a title valid against Paulding ; for, if any contracts or engagements were entered into by him during the existence of the community, which were binding upon him, showing that his apparent title was not a real one, but that he was bound to convey to Paulding, in fulfilment of a contract with Hunter, such an agreement, whether evidenced by private writings, shown to exist, and to have had a real date, by extrinsic evidence, or by authentic act, was binding on the community, descended to the heir of the wife as a necessary burden upon his inheritance, and he will be estopped by it from disturbing a title derived from the community. A contrary doctrine would, in our opinion, lead to the most revolting consequences. It would make it the interest of the wife to act the constant spy upon the daily transactions of her husband. It would compel him to act as if surrounded by enemies, or, at least, by strangers ; and it would make it the interest of his children to enrich themselves at the expense of their father's honor and good faith.

This view of the case leads us to examine the evidence, touch-

ing the title of the original plaintiff, beginning with the act of sale of 1828, after the dissolution of the community; in order to ascertain, whether there existed previously, and during the community, such a title in Paulding, by effect of his agreements with Hunter and Alfred Hennen, the last warrantor, as to make that act rather the consummation, or the discharge of a pre-existent contract, than *per se* the sale of the premises. That act declares, that Alfred Hennen has sold and conveyed to C. Paulding, the two lots, *without any warranty whatever, but his own acts*, the latter acknowledging himself in possession, for the sum and price of \$2673 31, cash, and the vendee assumes to pay the ground rents to the city corporation. The vendor conveys the right of recovering back-rents from those who may have occupied the premises as tenants. The deed recites, that the lots belonged originally to the city, were sold on ground rent; and, that the rents not being paid, they were seized and sold at sheriff's sale in 1813, and were purchased by the vendor, A. Hennen, subject to the ground rent.

It is shown, that Paulding was already in possession, and exercised acts of ownership. He had sued a tenant for rents, and in his petition, of which a copy is in the record, he alleged his ownership. It is true, he failed in his suit in the District Court, not having adduced satisfactory evidence of title. But the judgment was reversed in this court, because he showed possession since 1819.

In order to show how the title stood during the existence of the community, a document was introduced, signed by George Hunter, and bearing date the 17th of January, 1818, in the following words: "I have sold, for a valuable consideration, unto Cornelius Paulding, the two lots Nos. 27 and 28, lately belonging to Alexander's estate, bought by him, the said Alexander, of the corporation, and I request Mr. A. Hennen, in whose name the sale now stands, to pass the title to Mr. Paulding."

This document is in the handwriting of A. Hennen, and is shown, by incontestible evidence, to have been written at the time it bears date—at a time not suspicious, during the existence of the community, and in the absence of any possible motive to defraud any body, and, least of all, his own wife. Hunter is shown to

have been the owner of the adjacent lots, and to have made some improvements, and exercised acts of ownership. The ownership of the property was at that time considered as onerous, on account of the heavy ground rent due to the corporation, and no one appeared desirous of being known to the public as the owner.

Another document of a still earlier date, also in the handwriting of A. Hennen, was read in evidence. It is endorsed: "Geo. Hunter's papers,—Alfred Hennen's acct of cash paid by Geo. Simpson and others—ground rent on the Canal lots." "Geo. Hunter's paper, relative to money, p^d on Canal lots." These endorsements are in the handwriting of a member of Dr. Hunter's family, and of an agent of his son. The document was, without any doubt, in the possession of Hunter. It appears to be a memorandum of moneys received. After stating certain sums paid by Simpson, for ground rent on the two lots, he puts down: "Note of J. Poulteney, Jr. for \$605 45, paid for the two lots, originally bought of the corporation by Alexander, and sold to A. Hunter, for account of Dr. Hunter." "28th July, 1813, two lots, sold Dr. Hunter, for \$810, subject to an annual ground rent of \$330, from July 28, 1813."

Here is an admission, in the handwriting of A. Hennen, made also, at a time not suspicious, shown by extrinsic evidence to have a true date, that the two lots formerly the property of Alexander, belonged to Dr. Hunter, by a private agreement with him, although nominally the property of A. Hennen. The price is stated, to wit, \$810, and the ground rents at the rate of \$330, from the 28th July, 1813, the very day they appear to have been sold at the sheriff's sale.

Let us pause here, and inquire—whether Hennen, after writing himself these recognitions of the title of Hunter, and the order of Hunter to himself to convey to Paulding, and after Paulding had gone into possession, under his agreement with Hunter; after signing the petition of Paulding, as his attorney in the suit against Dowell for rent, in which the ownership of the plaintiff is distinctly alleged—could have been permitted to set up a title adverse to Paulding, and to have recovered the lots from him. Those private writings are binding on him. They contain unequivocal admissions, that he had no real title to the lots; that he was acting

as the confidential agent, or trustee of Hunter, with full notice that Hunter had transferred his rights to Paulding. When sued himself for the ground rents due to the city, he disclaimed title. With all this evidence against him, Hennen would have been repelled in any attempt to disturb the title of Paulding. It would have been dishonest to claim it. We cannot, therefore, but regard the act of sale, in 1828, to Paulding, as the mere performance of engagements already existing; as merely intended to furnish Paulding with authentic evidence of title: and this view of the case is strengthened by the consideration, that the price was within a few cents the exact amount which Hennen had been adjudged to pay, as the apparent owner of the lots, for back-rents due to the corporation.

These private writings, marked C and E, were not read to the jury without the most formal opposition, and the grounds of that opposition are set forth in a bill of exceptions in the record. That bill of exceptions presents most of the questions involved in this controversy. The first objection was, that these instruments contradict the authentic act passed between A. Hennen and Paulding, on the 19th of May, 1828. That act purported to convey, only such right and title as Hennen might have, and that without warranty; and is not, in our opinion, contradicted by evidence tending to show that the conveyance was made, in point of fact, in the performance and discharge of pre-existent agreements.

The second objection was, that under the answer of A. Hennen, these instruments went to establish a *trust* in behalf of George Hunter—an estate or interest not authorized by the laws of Louisiana. If by this was meant, that the *fidei commissa* abolished by the code, have any analogy to the confidential understanding between Hennen and Hunter, we think it a mistake. The *fidei commissum* prohibited by the code, is a species of substitution. The trustee is bound to retain for, and deliver to, a third person, the thing confided to him, which is placed beyond the control of the person making the trust. The relation between Hunter and Hennen was rather that of principal and agent, before the former directed a conveyance to Paulding; and after that, he became the agent of Paulding. It

was an agency not contrary to good morals, unless injurious in its effects to third persons. It was obligatory upon Hennen. Both the parties to that contract placed their confidence in him, and *turpe est fidem fallere*. Most of the great operations of commerce are carried on by factors, who rarely disclose to those with whom they deal the names of their principals.

The third objection is, that the documents were domestic papers, and not admissible as evidence in favor of the parties offering them. This was precisely the reason why those documents were admissible by the party claiming under Alfred Hennen, the head of the community. They were domestic papers, and could not be gainsaid either by him, or his wife. It would be monstrous to pretend that the wife, or her heir, is a third person, as to the husband in a technical sense, in the face of that admitted principle, that she can contest no acts done by him as head of the community, until after the dissolution of the marriage, and then only on the express ground of fraud. Civil Code, art. 2373. 9 La. 452. The 4th, 5th, and 6th objections are equally untenable. One of the documents is at once evidence of a right in Paulding, and not merely a commencement of proof in writing; and, whatever may be its form, is binding on Hennen, and did not require to be recorded in order to give it effect as to himself, and those claiming under him as the head of the family. Under these circumstances, we repeat, it would have been fraudulent and dishonest in Hennen, to have refused to comply with the request contained in the paper signed by Hunter, and, instead of conveying to Paulding, to have attempted to defeat a title created, not only with his knowledge, but through his confidential agency. No argument can be drawn from the long delay in complying with that mandate, which was not finally accomplished until 1828. In the meantime Hennen remained exposed to the imputation of being the owner, and to the danger of being compelled to pay the ground rents; but the city corporation alone had a right to complain of this concealment of the real person responsible for those rents.

But the plaintiff in reconvention alleges, that the act of sale of 1828, after the dissolution of the community, was fraudulent and

collusive. That charge is not only unsupported by evidence, but is contrary to the presumption of law, and the still stronger presumption arising from natural affection. What possible motive could Alfred Hennen have had, at any time, to defraud his own son; or, at an earlier period, the mother of his son? If that had been his intention, why did he, while rendering an account afterwards of his tutorship, account for a small tract of land in a remote parish of the State, and, at the same time, attempt to keep out of view two town lots, which had become valuable, in the centre of the city of New Orleans, the apparent title to which existed in the public archives, and was as accessible to the son as to the father? One of the counsel disclaimed all intention to place the cause of his client upon any such ground. We could have wished that the allegation itself had been effaced from the record; for, after the most mature consideration of this cause, we cannot bring our minds to the conclusion that those views and interpretation of the law are sound, upon which repose the pretensions of the plaintiff in reconvention. The community of *acquêts* and gains, as regulated by our code, is not fairly obnoxious to the reproach, that it leads necessarily to such results, or tolerates such a proceeding. In the best age of that republic, whose jurisprudence has descended to us, how would a son have been received by the Prætor, who should have sought to deprive a citizen of his dwelling, by alleging his father's turpitude? Even with this interpolation of the community, fruitful as it may be in frauds, leading to the disruption of families and heartless litigation, our existing laws will not tolerate such pretensions, and justify such a proceeding. "Honor thy father and thy mother," is as much a command of the municipal law, as it is a part of the Decalogue, regarded as holy by every christian people. "A child," says the code, "whatever be his age, owes honor and respect to his father and mother." This law would be without its best sanction, if a son were permitted wantonly to hold up a torch in our tribunals, in order to attract the public gaze to the alleged misconduct of the father. The law cannot be accessory to that course of conduct and proceeding, on the part of a son, which is calculated to weaken all there is of noble and elevated in family affections

Clarke, Assignee, v. Rosenda and another.

and domestic ties, and to bring down the grey head with sorrow to the grave.

Judgment affirmed.

JOSEPH C. CLARKE, Assignee of Jacob Zabriskie, a Bankrupt, v.
JEAN DOMINIQUE ROSENDA and another.

The writ of prohibition is one of the means given to the Supreme Court to enable it to exercise its appellate jurisdiction; and it may be issued either before, or after judgment. C. P. 845, 846. Where judgment has been rendered by a judge not having jurisdiction, and process has issued, the order is to be directed, to the party prosecuting, and to the officer: C. P. 853.

The act of Congress of 19th August, 1841, establishing a uniform system of bankruptcy suspended, if it did not abolish, all the laws of the different States relative to insolvent debtors, taking away the jurisdiction of their tribunals, and establishing others in their place, with ample and exclusive powers over every question touching the property surrendered by a bankrupt, its sale, and the disposition of the proceeds. The State courts have, consequently, no jurisdiction, and cannot interfere between a creditor put on the list of a bankrupt and his assignee, in any matter relating to the final liquidation of the estate surrendered. The decree of bankruptcy operates as a stay of all proceedings.

The act of 19th August, 1841, contemplates, that all property surrendered by a bankrupt, whether incumbered, or not, shall be administered by the court before which the proceedings in bankruptcy are pending. A mortgagee, or other privileged creditor, does not impair his rights, by proving his debt before the bankrupt court. He cannot abstain from claiming under the bankruptcy, and proceed contradictorily with the assignee, to have the mortgaged premises sold to satisfy his debt. He must make himself a party to the proceedings in bankruptcy, and come in for his dividend under the act of Congress.

RULE by the assignee of Zabriskie on Rosenda, and the Sheriff of the District Court of the First District, to show cause why a writ of prohibition should not be directed to them, restraining any further proceedings under an order from the District Court of the First District, for the seizure and sale of certain property of the bankrupt, which had been mortgaged to Rosenda, but was subsequently placed on the list of property surrendered by the bankrupt.

GARLAND, J. Zabriskie, being indebted to Rosenda in a large

Clarke, Assignee, v. Rosenda and another.

sum, executed a mortgage to him in the usual form under the articles of our code. The debt, not being paid at maturity, was renewed at different periods, as is fully stated in the case of *Rosenda v. Zabriskie*, 4 Robinson, 493; and finally executory process was issued, for the purpose of having the mortgaged premises seized and sold, according to articles 732, 733, *et seq.*, of the Code of Practice. To the execution of this order, or decree, Zabriskie made opposition, under articles 739, *et seq.*, of the Code of Practice. The opposition was tried in the inferior court, and upon an appeal to this, was remanded for a new trial. 18 La. 346. Whilst the cause was pending below, Zabriskie applied to the District Court of the United States for the benefit of the act of Congress, approved August 19th, 1841, establishing a uniform system of bankruptcy, placing Rosenda on the list of his creditors, and the mortgaged property on the inventory filed with his petition, as a part of what he proposed to surrender. During the pendency of the proceedings in the bankrupt court, Rosenda continued to prosecute his executory process, and had the lots so mortgaged advertised for sale by the Sheriff of the District Court of the First District; when, on the 7th of October, 1842, the District Court of the United States issued an injunction, forbidding the Sheriff and Rosenda from proceeding. On the 7th of November following, Zabriskie was regularly declared a bankrupt, and Clarke appointed his assignee, who took upon himself the functions granted by law. On the 1st of December, 1842, Rosenda, notwithstanding the decree in bankruptcy, and the injunction granted by the United States' Court, took a rule on the assignee, in the District Court of the State, to show cause why the sale of the property mortgaged should not proceed, under the judgment and seizure rendered and made previous to the decree in bankruptcy. On the hearing, this rule was made absolute, and the Sheriff of the Court ordered to proceed with the sale, in violation of the injunction issued by the District Court of the United States.

The petitioner now represents to this Court, that the proceedings of the Sheriff, and the judgment of the District Court authorizing the same, are contrary to law, as the said court had no jurisdiction or right to take cognizance of the matter; the proceedings of Zabriskie in the United States' Court, wherein a decree

Clarke, Assignee, v. Rosenda and another.

of bankruptcy was rendered on the 7th of November, 1842, having operated a stay of proceedings against the person and property of the bankrupt, in all other courts, from the date of the application to be declared a bankrupt and the order thereon. The Judge of the District Court of the First District, is therefore alleged to be incompetent, to order the sale of property surrendered by the bankrupt.

The petitioner further avers, that he is unable to give security so as to take a suspensive appeal, and that a devolutive appeal would be an inadequate remedy; wherefore he prays that this court will defend him from what he deems an illegal proceeding, and will issue a prohibition to the Sheriff of the District Court, to prevent him from making a sale of the lots of ground under seizure, and that the Sheriff and Rosenda may be perpetually restrained from proceeding further in the premises.

The defendants deny that this court can take cognizance of the case in its present form, and aver that it is without jurisdiction. They further aver that Rosenda has never made himself a party to the proceedings in bankruptcy in the United States' Court, and that he has a right to prosecute his claims in the State court, and to have the property sold, he having a mortgage thereon.

The question of the power of this court to issue writs of prohibition, in cases where the inferior courts exceed their jurisdiction, or are taking cognizance of causes not properly belonging to them, has been repeatedly considered, and the power is not now doubted, where a proper case is presented. It is one of the means given to enable us to exercise our appellate jurisdiction, and the writ may be issued before, or after judgment. Code of Practice, articles 845, 846. When a judgment has been given by a judge not having jurisdiction, and process has issued on it, the order is to be directed to the party prosecuting and to the officer, forbidding them to proceed. Code of Practice, art. 853. In this case, the court is asked to direct its order to the sheriff and party, and the court is unanimous in the opinion as to its jurisdiction.

Why the Judge of the District Court of the United States, has not caused his mandate or writ of injunction to be respected, is not shown, nor perhaps is it proper for us to inquire. It is possible he has not been judicially informed of the fact; but that presents

Clarke, Assignee, v. Rosenda and another.

no obstacle to our giving the party relief, when a State officer is the instrument about to be used, for the purpose of doing a party an irreparable injury, in violation of law. If the Judge of the First District has exceeded his power and jurisdiction in granting the order in question, there is no doubt of the power of this court to arrest its execution. Although the District Court of the United States may have power to punish the officer, who infringes or violates its order, it cannot correct the erroneous judgment.

The other question to be considered, involves the proper construction and operation of the act of Congress, passed the 19th of August, 1841, "to establish a uniform system of bankruptcy throughout the United States," and the right of a class of creditors to exempt themselves from the provisions of it, unless it be for their advantage to accept of them, merely because they have a particular kind of security, to insure the payment of their debts. The question also calls upon the court to say, whether, under the bankrupt law, there is a class of creditors above it entirely, and excepted from its provisions, which profess to establish a uniform system, or whether they are bound to prosecute their claims under certain restrictions and penalties.

My understanding of the objects of the bankrupt law is, that it was as much intended to give relief to embarrassed and unfortunate debtors, as to secure creditors in their rights. The different, and in some instances oppressive, State laws in relation to insolvent debtors, were intended to be abrogated; and for the purpose of securing creditors, and liberating debtors, who should honestly surrender all they possessed, the tribunals of the United States were invested with equity powers, (according to Judge Story,) more wide and liberal than an English Chancellor was ever authorized to exercise. They possess a general equity jurisdiction; and yet it is said, that the class of creditors having no security for their debts, cannot bring in the class that have, to have justice administered to all, and the rights of each respected and enforced; and that the bankrupt cannot bring them before the court, although bound to cite them, for the purpose of procuring his discharge.

In my opinion, the erroneous conclusions to which many intelligent minds have arrived, arise from not properly discriminating

Clarke, Assignee, v. Rosenda and another.

between the widely different provisions of the English bankrupt laws and our own, and the weight given to decisions made by eminent judges, under an impression that there is more analogy between the statutes in England and the United States, than really exists. In Great Britain, the bankrupt acts are remedial statutes made for the benefit of the creditor, to enable him to coerce the surrender of the property of his debtor, and to have it applied to the payment of debts; but with us, Congress had another and very different object in view, which was to enable the debtor, by giving up his property to his creditors, to compel them to discharge him entirely, provided he makes a complete and fair surrender. There is in my mind a marked distinction between a voluntary, and an involuntary bankruptcy, and the consequences are, therefore, different.

The principle of voluntary bankruptcy, as understood by us, and fixed by the act of Congress, is unknown in England to this day, the provision in a recent statute being widely different from that in our act of Congress. See act 6 Geo. IV., ch. 16, and 7 Geo. IV., ch. 57. It was also unknown in the act of Congress of the 4th of April, 1800. 3 Laws U. S., 320.

Having premised, that the object of the late law of Congress, was to relieve debtors, to secure to creditors the proceeds of the property surrendered, and to dispense with the State insolvent laws, I will proceed to examine the different clauses of the bankrupt act, and endeavor to show, that the United States' Courts are vested with ample powers to effect all these purposes; that consequently the State courts have no jurisdiction, and cannot interfere in a case between a creditor put on the list of the bankrupt, and the assignee, in any matter relating to the final liquidation of the estate surrendered.

The first step to be taken by a debtor about to avail himself of the benefit of the act, is, to make an accurate list of his creditors, stating their respective places of residence, and the amount due to each. An accurate inventory of his property, rights, and credits, of every kind, with a description of the location, and situation of each, and every parcel thereof, must also be made, and verified by oath. The presentation of these documents to the court, with a petition stating the inability of the party to pay his debts, is an act of

bankruptcy, and must be so declared, unless the creditors can prevent it. Sec. 1, Bankrupt law. All the property and rights of property of any and every description, real, personal, or mixed, is, from the moment an assignee is appointed, at once and by operation of law vested in him, and the bankrupt is divested of all title, without further assignment or conveyance, and the assignee is authorized to sell, manage, and dispose of the same, under the orders of the court, in the same manner as the bankrupt could have done. Sec. 3. All the creditors named in the list presented by the bankrupt, must have notice of the filing of the petition, and application for a discharge. Sec. 4. In all these proceedings we see little or no similarity to the English proceedings in bankruptcy, or to those formerly pursued in the United States. The debtor made no list of his creditors or property; he could not acknowledge himself a bankrupt; no notice was given to the creditors; nor did the property vest in the assignees, until after long and tedious proceedings, and a regular deed of bargain and sale. 2 M. & S. 446. 3 Petersdorff's Abridgment, 684, *et seq.* The sections 63, 64, 65, of the act of 6 Geo. IV., ch. 16, show clearly, that the mere appointment of an assignee, did not, in England, divest the bankrupt of the legal title to the property he possessed, as under the act of Congress. The commissioners were authorized to convey the bankrupt's rights. The legal title, according to the common law, is much modified, if not changed by a mortgage upon the estate; it is not by our law. For the purpose of protecting the liberty of the debtor, and the property surrendered for the benefit of the creditors, the Circuit and District Courts of the United States have jurisdiction, in all matters and proceedings in relation to the bankruptcy; the proceedings are to be summary; the courts are always open; and the authority of the Judges extends to all cases and controversies, between the bankrupt and any creditor, or creditors, who claim any debt or demand under the bankruptcy; to all cases and controversies between the creditors and the assignees, whether in office or removed; to all cases between the assignee and the bankrupt; and to all matters and things, until the final distribution, and settlement of the estate, and the close of the proceedings. All sales, transfers, and other conveyances of property and rights, can only

Clarke, Assignee, v. Rosenda and another.

be made at such times and places, and in such manner as the court shall direct; the money received is at the disposition of the court; and, to sum up all, I repeat the remark of Judge Story, that no English Chancellor ever possessed, or exercised powers so great as those vested in the United States' Courts, with full authority and jurisdiction, to compel obedience to all their orders and decrees, either by process of contempt, or remedial writs. Sections 6, 8, 10. I cannot imagine a more ample investment of jurisdiction than Congress has conferred on the Circuit and District Courts of the United States, and the extent of the jurisdiction proves, that the National Legislature, whilst exercising its constitutional power to establish a uniform system of bankruptcy, intended to suspend, if not to sweep out of existence the insolvent laws of the States, and the jurisdiction of their tribunals, and to establish other tribunals with ample powers, where justice should be alike administered to all, and a general system formed and controlled by a body of Judges, deriving authority from the same power that made the law.

Entertaining, as I do, the opinion that the courts of the United States have entire and complete jurisdiction over every question relating to the property surrendered by a bankrupt, its sale, and the disposition of the proceeds, I might here stop, and rely upon those tribunals exercising their powers, in conformity with the decision of the Circuit Court, recently given in the case of *Christy, Assignee, &c. v. The City Bank of New Orleans*. But it has been gravely contended, and argued with much ability, that although Congress has bestowed the almost unlimited powers mentioned on the United States' Courts, and intended to suspend, if not abolish all State insolvent laws, yet there is a large class of creditors, and a vast amount of property placed on the inventories of bankrupts, that is excepted, and remains under the care of the State tribunals. These positions I will now examine.

It is not pretended, that there is any personal disqualification or privilege, that prevents such creditors as Rosenda, from going, or being brought into the bankrupt court, nor is there any thing in the nature or form of the contracts, that excludes them; but the reason is, that the creditor has a particular kind of security to insure the payment of his debt, which is to be abandoned if he

appears in obedience to the summons or notice given him, which security can only be made available in a State tribunal, unless the creditors choose to present the matter in a certain mode to the United States' Court. It has always appeared to me remarkable, that Congress, if it intended that all creditors having securities by mortgage, pledge, or lien of any description, should stand out of court at their pleasure, should not have made some more explicit provision for their government, and for the disposition of much the largest portion of the property bankrupts would be likely to surrender; and as to the mode by which the bankrupt should obtain a discharge, that would be operative against such creditors afterwards. It seems to me a strange anomaly, that the law should require of the party asking to become a bankrupt, to furnish the names and residence of all his creditors, with a description of all his property, and that such creditor must be notified of the application, but when cited is not bound to appear, or if he does appear in the bankrupt court, is obliged to surrender a portion of his rights. The consequences to which the doctrine contended for, will assuredly lead, are so pernicious and inconvenient, that it is impossible for me to believe it sound; and, I repeat, that it is founded upon decisions made in the English tribunals, under laws widely different from ours. To enumerate all their discrepant provisions would occupy too much space; but I cannot omit noticing a few.

By the English statute of bankruptcy, 6 Geo. IV., c. 16, sec. 81, it is enacted that all executions and attachments, against lands and tenements, or goods and chattels, *bona fide* executed or levied more than two months previous to the issuing of the commission shall be valid, notwithstanding the act of bankruptcy, provided the person issuing it had no notice of the act of bankruptcy. The English books are full of cases brought by the assignees against the creditors, to recover from them money made on execution after the act of bankruptcy was known. 3 Petersdorff's Abridgment, 806. 2 Bl. Rep. 827. 1 H. Bl. 665. Actions of trover have been repeatedly maintained to recover the goods seized after the act of bankruptcy was known, not only against parties to it, but against the Sheriff who executed the process. 3 Petersdorff, 815. 1 Bl. Rep. 65. 1 Lev. 173.

Clarke, Assignee, v. Rosenda and another.

A right of distraining for one year's rent, immediately preceding the date of the commission, is reserved by the statute in England, (6 Geo. IV., c. 16, sec. 74); and various other privileges or preferences are recognized by the statute, to be enforced in the ordinary tribunals, (sec. 81,) unknown to the act of Congress. The latter is, in fact, more an insolvent law, than a statute of bankruptcy; and the attempt to combine the provisions of both, has led to doubts in what way the act of Congress is to be carried into effect.

From some personal acquaintance with the objects, which some of the framers of our bankrupt law had in view, I am satisfied, that it was their intention that all the creditors of the bankrupt should be in court, and all the property, whether incumbered or not, administered under its supervision. If such were not the intention, I see but little use in citing all the creditors, and having an inventory of the property. If conformity to the English statutes was expected, why were not their requirements inserted? The framers of the law had all the modern British statutes before them, and we see but little conformity to them; it is therefore fair to presume, that something different was intended.

Were it not for the provisions contained in the 5th and 11th sections of the act of Congress, I presume there would not be a doubt, that all the creditors were bound to come into the bankrupt court, and that the property should be administered under its supervision and control. The first of these sections provides, "that all creditors coming in and proving their debts under such bankruptcy, in the manner hereinafter prescribed, the same being *bona fide* debts, shall be entitled to share in the bankrupt's property and effects, *pro rata*, without any priority or preference whatsoever, except only for debts due by such bankrupt to the United States, and for all debts due by him to persons who, by the laws of the United States, have a preference, in consequence of having paid moneys as his sureties, which shall be first paid out of the assets; and any person who shall have performed any labor as an operative in the service of any bankrupt, shall be entitled to receive the full amount of the wages due him for such labor not exceeding twenty-five dollars." This section further provides, that "no creditor or other person, coming in and proving his debt or other claim shall be allowed to

Clarke, Assignee, v. Rosenda and another.

maintain any suit at law or in equity therefor, but shall be deemed thereby to have waived all right of action and suit against such bankrupt; and all proceedings already commenced, and all unsatisfied judgments already obtained thereon, shall be deemed to be surrendered thereby." It was the intention of the law-maker, in this section, to do a variety of things; *first*, to establish a mode of distribution to be pursued in the bankrupt court; *secondly*, to direct specially a certain preference to be given to debts owing to the United States, or persons claiming under them; and *thirdly*, to create a privilege previously unknown to the laws of the United States in favor of laborers. It was further intended to prevent any creditor from suing for his debt in another court, or prosecuting a judgment already obtained by execution or otherwise, after having received his share of the assets. But nothing is said of any forfeiture of his legal rights, securities, or privileges. They are secured and controlled by the last proviso of the second section, which says, that "nothing in this act contained, shall be construed to annul, destroy, or impair any lawful rights of married women, or minors, or any liens, mortgages, or other securities on property, real or personal, which may be valid by the laws of the States, respectively, and which are not inconsistent with the provisions of the second, and fifth sections of this act." To give this proviso effect, it is contended, that a mortgage creditor must not go into the bankrupt court at all. If he do, and prove his debt there, it is said, that he loses his preference; and this idea is founded upon a practice, and decisions based on a statute, that contains no such exception. My opinion is, that the object of this proviso, was to regulate the rights of the parties in the bankrupt court, and to prevent the multiplication of suits, and the prosecution of demands before different tribunals. That I am certain, was the object of some of the framers of the bankrupt law, and I see no reason why the rights and privileges of mortgagees, and other creditors having liens, cannot as well be adjusted in the United States', as in the State courts. It appears to me as rather technical to say, that because a mortgage, or privilege creditor, alleges that he has a mortgage or other security, he thereby forfeits it.

The 11th section of the act is further relied on to prove more

Clarke, Assignee, v. Rosenda and another.

conclusively, that the mortgagee is not bound by the proceedings in bankruptcy. It says, "the assignee shall have full authority, by, and under the order, and direction of the proper court in bankruptcy, to redeem and discharge any mortgage, or other pledge, or deposit, or lien upon any property, real or personal, whether payable *in presenti*, or at a future day, and to tender a due performance of the conditions thereof." This clause does not seem to me necessarily to exclude the mortgage creditor from the bankrupt court; but on the contrary to assume, that he is in court, and that he insists upon the execution of his rights, in a manner that the assignee may deem injurious to the interests of the other creditors, in which case power is given to the District Judge, to direct a portion of the funds belonging to the creditors who possess no privileges, to be applied to the redemption of the mortgage or lien; or such a proceeding may be necessary, where the property is neither in the possession of the bankrupt nor his assignee; or where the legal title is vested in the creditor, as is the case with mortgages in England, and in those States where the common law prevails; or where a qualified property exists, as in the case of a pawn or pledge. This view of the case is sustained by an examination of sec. 70 of the act of 6 Geo. IV., ch. 16, and Archbold's notes on the statute, 129, 130, and the authorities he cites, and from the constitution of the English tribunals emanating from the same authority, and not, as ours, deriving their power from separate sources.

I have not seen any decision of an English court since the act of 1 and 2 William IV., ch. 56, which created a bankrupt court, and specially vests all the property in the assignee, and therefore cannot tell whether the previous decisions have in any degree been modified or altered. The decisions of Judge Story and others, as quoted from the different numbers of the Law Library, and newspapers, are not in my opinion entirely correct, being based upon precedents and decisions, under the old English statutes relating to bankruptcy.

If it be permitted to the creditors of a bankrupt, secured by mortgage or privilege, to stand out of the bankrupt court, as long as they think proper, and prevent the property surrendered from

being sold, it would have the effect of enabling them to delay the administration, and final settlement of the estates of bankrupts, in contravention of the 10th section of the act of Congress, which provides for their prompt liquidation and settlement. To this it is answered, that the assignee may sell the property surrendered, subject to the mortgage or lien existing, or, in other words, sell the equity of redemption. To this mode of selling property, I see many objections; and very few cases would arise in which injury would not result to the mortgagees or ordinary creditors. Take the case now under consideration as an example. The amount actually owing by Zabriskie, is in controversy, and in the present state of the case it is impossible to fix any sum, for which the property can be sold. It is therefore proper that the rights of Rosenda should be examined and settled, contradictorily with those whose interests are so closely connected with his.

Many cases can be supposed in which it would be very difficult, if not impossible, to carry out the idea of selling the property subject to the lien or mortgage. Take the case of a judicial mortgage, which operates on all the immoveable property of the bankrupt; or the legal mortgage and privilege, which a married woman has for the restoration of her dotal property, which extends not only to immoveables but moveables. There would, in such cases, be no mode of disposing of the property, but by selling the whole estate at once; which could not result otherwise, than in injurious consequences to all the ordinary creditors. Considering the embarrassments, delays, and difficulties that will result in the settlement of bankrupt estates, from permitting a portion of the creditors to stand out of court, and prevent the property from being sold by the assignee, I am obliged to conclude, that they have no such right. The act of Congress does not give it in direct terms, and I cannot allow it upon precedents and arguments which I consider inapplicable.

SIMON, J. For the reasons adduced by Judge GARLAND, in the opinion which he has just delivered, I adopt the conclusion to which he has arrived, on the important question submitted to our deliberation.

MARTIN, J. being interested in the question, did not sit on

Clarke, Assignee, v. Rosenda and another.

the trial of this case ; and MORPHY, J. concurred with the majority of the court.

BULLARD, J. dissenting. The facts which this case discloses appear to be, that Rosenda had a special conventional mortgage on certain lots, in the city of New Orleans, belonging to Zabriskie ; that, before the application of the latter to be declared a bankrupt in the District Court of the United States, Rosenda had sued out of the State court, an order of seizure and sale ; that after the appointment of the assignee, he was made a party to the proceeding ; that the petitioner, Clarke, was appointed assignee, on the 7th of November, 1842, and that he applied to the District Court of the United States, sitting in bankruptcy, and obtained an injunction staying the proceedings of the mortgage creditor, and of the Sheriff, under the order of the State Court ; that afterwards, Rosenda took a rule on the assignee in the State court which had issued the order of seizure, to show cause, why the Sheriff of the District Court of the State, should not proceed to sell the property under seizure, according to the order of the court ; and that the rule was made absolute, and the Sheriff advertised the lots for sale, when the assignee obtained from this court a prohibition *nisi*.

The answer maintains the jurisdiction of the District Court of the State, and thus presents the question growing out of the late act of Congress, establishing a uniform system of bankruptcy, whether a mortgage creditor of a bankrupt can abstain from claiming under the bankruptcy, and proceed at law, contradictorily with the assignee, to have the mortgaged premises sold to satisfy his debt ; or whether he be bound to make himself a party to the proceedings in bankruptcy, and come in for his dividend under the act of Congress, and according to the rules established by the bankrupt court. The assignee asserts the exclusive jurisdiction of the bankrupt court, over all the property given up by the bankrupt, and vested in the assignee, and the incapacity of any of the creditors to proceed in any other tribunal, whether *in personam* or *in rem*, and that the decree of bankruptcy operates as a stay of all proceedings. On the other hand, it is contended by the mortgage creditor, that he has never made himself a party to the proceedings in bankruptcy, has never proved his debt, and

Clarke, Assignee, v. Rosenda and another.

claimed to be paid by the assignee ; but that his right as a mortgagee, is expressly protected by the act of Congress, and that he has a right to proceed and foreclose his mortgage in the State court, upon making the assignee a party to the proceedings.

My opinion is, that the mortgagee is not compelled to go in and claim his debt under the bankruptcy ; that he may proceed wholly independently of the bankruptcy upon making the assignee, however, a party ; and that the assignee takes no greater right in the mortgaged premises, than the bankrupt himself had ; that is to say, a *residuum* after paying the debt secured by mortgage coupled with the possession. He takes the property *cum onere*, and the mortgage is saved by the act of Congress. It is a general principle, if I mistake not, that all assignees, whether conventional or legal, take the property assigned, subject to all the equities to which it was subject in the hands of the assignor. The property passes in the same condition and plight as it was possessed by the bankrupt, in cases of legal assignment by bankruptcy. 2 Story's Equity, § 1411. 9 Vesey, 100.

The various provisions of the late act of Congress, establishing a uniform system of bankruptcy in the United States, satisfy me that Congress never intended to make an exception to this general rule. But, before I proceed to examine and compare the different provisions of the act, I will premise, that Congress could not, under the constitution, establish any other than a uniform system of bankruptcy. It could not have been the intention of Congress to create, in the other States, a system analogous to the common law system of bankruptcy, and in Louisiana, the *cessio bonorum*, or *concurso de acreedores*, as known to our local jurisprudence, and derived from that of Spain, in which all the property of the ceding debtor is administered by a syndic, appointed by the creditors, as their common mandatary ; in which all the creditors, whatever may be the nature of their debts, become parties, and are at the same time both plaintiffs and defendants ; in which all suits against the debtor, are cumulated before the same tribunal, and the syndic proceeds to reduce the property, the common pledge of all the creditors, to cash, by selling it free from all incumbrances, on terms dictated by the creditors, and then distributes the proceeds among all, according to their respective

Clarke, Assignee, v. Rosenda and another.

ranks as creditors, whether by mortgage, special or general, or by privilege, or lien, in conformity to that complex scale existing in our code, so well calculated to entangle unwary creditors, whose honest debts are often swallowed up, and lost, amidst the hidden reclamations of wives, minors, pupils, law charges, &c., &c.; a system utterly unsuited to a commercial country, and so different from that prevailing in the other States of the Union, that a final tableau of distribution, with all its mortgages, general, special, legal or judicial, its privileges upon moveables or immoveables, either general or restricted, its law charges, fees of attorneys, of syndics, and fees of attorneys of absent creditors, and all those other devices by which all estates, whether of the living or of the dead, are decimated, would be unintelligible out of this State.

But let us examine now, in detail, the provisions of the act of Congress. In the first place, the third section, which provides for the appointment of an assignee, and defines his powers and duties, declares, that the property vests in him *ipso facto*, "and that the assignee shall be vested with all the rights, titles, powers, and authorities to sell, manage, and dispose of the same, and to sue for and defend the same, subject to the orders and directions of the court as fully, to all intents and purposes, as if the same were vested in, or might be exercised by such bankrupt before, or at the time of his bankruptcy, declared as aforesaid; and all suits in law and in equity then pending, in which said bankrupt is a party, may be prosecuted and defended by such assignee to their final conclusion, in the same way, and with the same effect, as they might have been by the bankrupt." This section shows the extent of title vested in the assignee. He takes the place of the assignor. It shows also that all actions against the assignee are not necessarily cumulated before the same jurisdiction; that actions already pending, may be carried on to final judgment, contradictorily with the assignee, wholly independent of the bankrupt court.

The fifth section declares the manner in which the creditors of the bankrupt shall be paid. It provides that all creditors coming in, and proving their debts under the bankruptcy, shall be entitled to share in the bankrupt's property and effects *pro rata*, without any priority or preference whatever, except only for debts due by

Clarke, Assignee, v. Rosenda and another.

such bankrupt to the United States, and for all debts due by him to persons who, by the laws of the United States have a preference, in consequence of having paid moneys as his sureties, which shall be first paid out of the assets, and next, certain operatives, to an amount not exceeding twenty-five dollars each. It will be remarked, that no provision is made for paying mortgage or privileged debts according to their rank. All who prove their debts in the bankrupt court, must share alike, with the three enumerated exceptions. Can we create another exception? Can we say that the mortgagee is compelled to come in, and that he may be preferred in the distribution of the assets to ordinary creditors? It is said, that the proviso to the second section qualifies this provision. The proviso in question, is in the following words: "That nothing in this act contained, shall be construed to annul, destroy, or impair any lawful rights of married women, or minors, or any liens, mortgages, or other securities on property, real or personal, which may be valid by the laws of the States respectively, and which are not inconsistent with the provisions of the second and fifth sections of this act."

Taking the words in this proviso in their ordinary sense, I should suppose the Legislature intended, that, notwithstanding the bankruptcy, and the vesting in the assignee of all the property of the bankrupt, yet all mortgages, privileges, and liens, previously existing, should remain unimpaired. Such, indeed, are the very words of the section—those mortgages or liens shall not be *annulled, destroyed, or impaired*. Can the right of the mortgagee be said to be *unimpaired*, when, in spite of his opposition, the assignee assumes to sell the property free from all incumbrances; to give a clear title to the purchaser; to obtain the erasure of the mortgage from the Recorder; and turns the mortgagee over to his remedy against the assignee, for such portion of the debt due him as may not be absorbed in expenses of administration—to transform the claim of the mortgagee from the *thing* to its *price*, secured by a right of action upon the bond of the assignee? And what is this right of the mortgagee? It is a *jus in re*—it gives the mortgagee a right to pursue the thing into whosoever hands it may pass. While it is admitted on all hands, that under the English bankrupt system the mortgagee may stand out, and retain

 Clarke, Assignee, v. Rosenda and another.

his title in, or to the mortgaged premises, it is said, that a mortgage at common law is quite a different thing from a Louisiana mortgage; that by our law the mortgage is merely a security for the payment of money, whereas at common law, the legal title is in the mortgagee. In both systems the mortgagor retains possession—in both the mortgagee acquires a *jus in re*; and what is that but an estate, a legal title, not *to the thing*, but *in it*. The difference is merely technical; and Lord Mansfield never said a truer thing, in my opinion, than when he declared, that a mortgagee, notwithstanding the form, has but a chattel, and that a mortgage is only a security, and that it is an affront to common sense to say that the mortgagor is not the real owner. Doug. 610. 11 Johnson, 536.

It is further said, that the rights of mortgagees are secured in the same way as they are by the local law of the different States; and hence it is inferred, that as the syndic, under our State system of *cessio bonorum*, would have a right to sell the mortgaged property, and distribute the price according to the rank of the creditors; the assignee under the bankrupt law may do the same thing; and this is what they call a saving, from being *annulled, destroyed, or impaired*, of the rights of mortgagees. This construction would be much more plausible, if the act of Congress made provision for any other than a *pro rata* distribution of the assets. I infer, on the other hand, that nothing goes to the assignee for distribution among the creditors who prove their debts, but the *residuum* after paying off the incumbrances; and this consideration is fortified by another provision of the act, (sec. 11,) by which the assignee is authorized, by and under the order and direction of the proper court in bankruptcy, *to redeem and discharge* any mortgage or other pledge, or deposit, or lien upon any property, real or personal, whether payable *in presenti* or at a future day, and to tender a due performance of the condition thereof. If it had been the intention of Congress, that the assignee should in all cases sell the mortgaged premises and distribute the proceeds as pretended in this case, why authorize him to pay off the incumbrance and redeem the property? How can the two be reconciled? The one implies that the mortgagor may stand aloof and require the payment of his hypothecary debt by the as-

Clarke, Assignee, v. Rosenda and another.

signee; the other that he is compelled to come in and prove his debt, and contribute, of course, his share to all the charges of the administration. An authority in the assignee to redeem implies a correlative right in the mortgagee to *retain* until the debt is satisfied. I cannot bring my mind to any other conclusion, than, that the assignee may either sell the equity of redemption, or the property subject to the mortgage, or that he may, if he thinks proper, redeem the property by paying off the incumbrance, and distribute the *residuum* among the creditors who prove their debts. The same end is thus attained without impairing the right of the mortgagee, and without imposing upon him any share of the charges of administration. It is true, the matter is not free from difficulty when there are general mortgages, either legal or judicial, which operate on all the real estate and slaves of the bankrupt; but the Code of Practice seems to me, to have made sufficient provisions for a *concurso* in such cases.

There is yet another provision of the act of Congress to be considered in this connection. I mean that part of the fifth section which declares, that no "creditor or other person, coming in and proving his debt, or other claim, shall be allowed to maintain any suit at law or in equity therefor, but shall be deemed thereby to have waived all right of action and suit against such bankrupt, and all proceedings already commenced, and all *unsatisfied judgments* already obtained thereon, shall be deemed to be surrendered thereby." Now let me suppose the case of a judicial mortgage, which is one resulting from an *unsatisfied judgment* recorded. Can the holder of such a claim prove his debt under the bankruptcy, without being deemed to have waived his judgment, and consequently his mortgage? I think not.

But if the act declares, that those who prove their debts under the bankruptcy, shall not maintain any action or enforce any previous judgment, does it not follow, by direct implication, that those who stand aloof, and have *unsatisfied judgments*, may rely upon them without claiming in the bankrupt court, and may retain their right of action if they choose to rely upon rights already acquired?

And here it may not be amiss to remark, that the jurisdiction

Clark, Assignee, v. Rosenda and another.

of the bankrupt court extends to all cases and controversies, in bankruptcy, arising between the bankrupt, and any creditor, or creditors, who shall claim any debt or demand under the bankruptcy; between such creditors and the assignee; between the assignee and the bankrupt; and to all acts, matters and things, to be done under and in virtue of the bankruptcy; but it does not extend, in terms, to all the creditors, except that they are entitled to notice of the preliminary proceedings. Those who have not proved their debts, are not to be consulted as to the discharge of the bankrupt. It is further to be observed, that the discharge and, certificate, "when duly granted shall, in all courts of justice, be deemed a full and complete discharge of all debts, contracts, and other engagements of such bankrupt, which are *proveable* under the act," not merely such as are proved. And this expression shows that the act requires only, that the creditors shall have an opportunity to prove their demands.

But it is said, that the mortgage is but an accessory, and that it is absurd to destroy the principal obligation, and leave the mere accessory to subsist; that, as the discharge operates as a release of all the debts, it necessarily must release all the mere securities. But it must not be forgotten, that the mortgages and liens are expressly saved and reserved. I infer from these provisions, that the remedy *in rem* is not destroyed, or annulled, by the discharge. The remedy is saved so far as the specific property is concerned, precisely as an hypothecary action may be carried on against a third possessor, who is not liable personally for the debt.

That such is the practice under the English bankrupt system, is abundantly shown by the authorities to which our attention has been called. Creditors holding a security are not permitted to prove, unless they will give up their security, or the value has been ascertained by a sale of it. When the creditor thinks the property forming the security is not equal to the payment of his debt, he may apply to have it sold, and to be admitted as a creditor for the residue. Personal securities may thus be sold, as well as an estate. Nor can a second mortgagee be compelled to join in such sale obtained by a prior mortgagee. The same rule applies to the right of a vendor for any part of the purchase money un-

paid, or what we call the vendor's privilege. Bankrupt Law, p. 104, 105, *et seq.*

All the commentators, whose works I have seen, upon the late act of Congress, put this construction upon it. Owen, in his Treatise on the Law and Practice of Bankruptcy, says: "When an estate has passed from the bankrupt, defeasible upon the performance of a condition, such as that created by a mortgage, the assignee has, by virtue of the decree, the equity of redemption, and may either redeem the mortgage under the direction of the court, or sell the estate subject thereto."—page 61.

So far as I have been able to learn, the decisions of the Circuit Courts of the United States, have been uniform on this point, and consonant with the views herein expressed. In the matter of *Enoch Cook*, in the Circuit Court of Massachusetts, Judge Story held that the lien of a judgment upon property attached, according to the laws of Massachusetts, was within the proviso of the second section of the bankrupt law, and saved thereby, and is wholly unaffected by the proceedings in bankruptcy, when the judgment had been obtained in the regular course, before any petition, or decree, or discharge, in bankruptcy. An injunction was, therefore, refused to stay proceedings by the judgment creditor, on his judgment in the State Court. The lien was perfect by the effect of the judgment; and it was decided, that the assignee was not entitled to take the property, subject to the lien, but that the creditor might proceed on his judgment. "The proceedings in bankruptcy," says the court, "after the judgment, can have no effect whatever upon that judgment, or upon the property attached in that suit. The creditors have made their rights, (call it, if you please, their lien,) perfect under the attachment."

According to the doctrine here contended for, the assignee in that case would have been entitled to take the property, subject to the lien, and sell it, giving to the judgment creditor a preference to be paid out of the proceeds, after deducting a share of all the expenses of the administration of the bankrupt's assets, proportioned to the amount of the sale. This is not what I call *saving* a lien or mortgage, under the proviso of the second section. Suppose the creditor is satisfied with his investment and with his security? Shall he be compelled to receive his money,

or a part of it, and to submit to a sale of the property, according to conditions unknown to the law when he contracted?

I conclude that the prohibition ought to be set aside.

Rule made absolute and prohibition granted.

MARTIN GORDON v. HIS CREDITORS.

Where two persons purchase jointly, each an undivided half of certain property, and give their notes endorsed by each other for the price, mortgaging the whole property to secure the payment of the whole price, on the sale of either half, the proceeds must be distributed proportionably among the holders of the different notes. The holder of the notes made by the purchaser whose half was sold, cannot claim the whole proceeds of his half of the property.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*

T. Slidell, for the appellant.

C. M. Jones, contra.

BULLARD, J. The statement of facts shows, that Gordon & McHenry purchased jointly of Dixon & Cammack certain lots of ground. That Gordon gave his notes, for one-half of the price, endorsed by McHenry, and that McHenry gave his notes for the other half endorsed by Gordon, and that the land was mortgaged to secure the payment of all the notes. Gordon's undivided half was sold by his syndic, and the distribution of the price forms the subject of this controversy, upon the homologation of the tableau. The Carrollton Bank being holders of two of the notes drawn by Gordon, for \$2125 each, claims to receive the whole proceeds in preference to Cammack, who appears to be the holder of one of the notes of McHenry for the same amount, and who claimed to be paid out of the fund in that proportion. The court ordered the fund to be distributed proportionably, and the Bank has appealed.

The case differs widely in our opinion from that of *Walton & Kemp v. Lizardi*, 15 La. 596, upon which the appellant's counsel relies. In the present case, not only each purchaser acquired an undivided half of the lots, but each became liable for the pay-

Succession of Milne—The Duke of Richmond and others, Appellants.

ment of the whole price, either as drawer, or endorser, and the whole of the property was mortgaged to secure the payment of the whole and every part of the price. The court, therefore, did not err in ordering the proceeds of the sale to be distributed proportionably.

Judgment affirmed.

SUCCESSION OF ALEXANDER MILNE—CHARLES GORDON, DUKE OF RICHMOND and others, appellants.

The commission of two and a half per cent allowed to executors by art. 1676 of the Civil Code, cannot be claimed on the value of waste, uncultivated land. Such land cannot be considered as a part of the productive property of the succession.

APPEAL from the Court of Probates of New Orleans, *Bermudez, J.*

L. C. Duncan, Hoffman, and Eustis, for the appellants.

Canon, for the testamentary executor, relied on arts. 1619 and 1676 of the Civil Code, and the case of *Young v. Chancy*, 3 La. 464.

BULLARD, J. The dative testamentary executor having presented his account, the following item was opposed, to wit: "*Commission sur les billets et terrains moins les nonvaleurs, \$702,769 et 65 cents, à 2½ pour cent, \$17,569 25.*" The opposition was overruled, the whole amount of the commissions allowed, and the opponents prosecute the present appeal.

The Judge of the Court of Probates admits that this identical question of commissions was decided by this court in a case between the same parties. See *1 Robinson*, 400. It is clear that a great part of the real estate, upon which these commissions are given, consists of waste lands, not cultivated, and a part not susceptible of cultivation. We cannot regard that species of property, as the *productive* property of a succession, upon which the executor is entitled to charge a commission. The best evidence that it is unproductive is, that in the hands of the present executor it has produced nothing.

The evidence does not enable us to come to a definitive conclusion as to the amount of commissions to which the executor is really entitled; and for this purpose the case must be remanded.

The judgment of the Court of Probates is therefore avoided and reversed; and it is further ordered that the case be remanded for further proceedings; the costs of this appeal to be paid by the appellee.

F. B. CONRAD, Assignee of Thomas Banks, a Bankrupt, v.
DENIS PRIEUR, Recorder of Mortgages for the Parish of
Orleans,

Under the bankrupt act of 19th August, 1841, the District Courts of the United States, sitting in bankruptcy, are vested with all the powers necessary to effect a final settlement and liquidation of the affairs of the bankrupt. Sections 6, 8.

The interest of persons holding mortgages or privileges under the laws of Louisiana on property surrendered by a bankrupt, is an adverse interest touching such property, and under sections 6 and 8 of the bankrupt law of 1841 the District Courts of the United States are vested with power to cite such persons, and to order the erasure of the mortgages and privileges, when necessary for the settlement of the bankrupt estate, and to do justice to the creditors; and it will be the duty of the Recorder of Mortgages under the State laws, to obey such order.

There are essential differences between the bankrupt law of England and of this country. The former is exclusively a forced proceeding; the bankrupt is not required, as here, to make a surrender of all his property for the benefit of all his creditors; a creditor may take no part in the bankrupt proceedings, but retain his remedy in the courts of law. Here, by the law itself, every creditor is made a party to the bankruptcy, all are cited, and an issue is joined between them and the bankrupt, who, in consideration of his surrender, sues for a discharge.

From the nature of the mortgages and privileges allowed by the laws of this State, no settlement of a bankrupt's estate on which such incumbrances exist, could ever be made without reducing the whole estate to cash; and this can only be done after the property has been released from the incumbrances. Such an estate can only be settled in a *concurso*, contradictorily between all the creditors.

By the laws of this State, both the possession and title of property subject to mortgage, whether conventional, legal, or judicial, remain in the debtor, and the mortgagees are to be paid, according to the dates of the registry of such mortgages in the office of the Recorder of Mortgages, or of the acts giving rise to any legal mortgage, and the mortgage is but an accessory to a principal obligation, and is extinguished with it. C. C. 3374. Most of the privileges recognized by our laws are allowed in view of insolvency, and can be exercised only on the proceeds of the

Conrad, Assignee, v. Prieur, Recorder of Mortgages.

property surrendered by the debtor. By the laws of England, and of the other States of the Union, though regarded in equity as a mere security for the debt and only a chattel interest, a mortgage transfers the property itself, and vests the legal title in the mortgagee. Hence, while in England, and the other States, the equity or right of redemption alone passes to the assignee, here, all the property, whether subject to mortgages and privileges or not, becomes a part of the bankrupt's estate, subject to the disposition of the bankrupt court.

A mandamus will be granted by a State court to compel obedience to an order of a District Court of the United States sitting in bankruptcy, directing a Recorder of Mortgages to erase certain mortgages.

APPEAL from the Parish Court of New Orleans, *Maurian, J.*
Benjamin, for the plaintiff.

Roselius and *Grymes*, for the appellant.

MORPHY, J. This was an application to the Parish Court of New Orleans by F. B. Conrad, assignee of Thomas Banks, for a mandamus commanding the Recorder of Mortgages of the parish of Orleans, to raise certain mortgages on property of the bankrupt sold by the assignee, in order to give an unincumbered title to the purchasers. The petitioner represents, that amongst the surrendered property there were sundry valuable tracts of land which had been mortgaged by the bankrupt; that at the request of the first mortgagees on said property, he applied to the United States District Court for the Eastern District, sitting in bankruptcy, for an order authorizing the sale of the mortgaged premises, and decreeing the erasure of the mortgages recorded against them; that all the mortgagees holding liens upon the property were thereupon duly cited to oppose this application, if they saw fit so to do; that no opposition having been filed, a judgment supervened, decreeing the erasure of the mortgages, the sale of the property by the Marshal of the United States for this District, and the reservation to all interested parties, of their respective rights to the proceeds of the sale, when effected; that a sale having taken place under this decree, the assignee presented to the Recorder of Mortgages a copy of the judgment of the United States Court, and required him to erase the mortgages according to its tenor, and to deliver to him a certificate showing the property to be free from all incumbrances, but that officer refused so to do, alleging that the judgment was invalid and of no legal force, or effect. After hearing the parties, the inferior Judge

ordered the mandamus to issue, whereupon the Recorder of Mortgages appealed.

The only question which this case presents is one of jurisdiction; for if the District Court sitting in bankruptcy was competent to cite in the mortgage creditors, and make an order for the erasure of their mortgages, we cannot review its decision, or inquire into its correctness. It had occurred to me, that as the District Court has assumed jurisdiction, and has full authority to compel obedience to its decrees, the Judge below should perhaps have refused to interfere; but, upon further reflection, I believe that a State court should not withhold the expression of its opinion, when it is legally called for by a State officer, either on his own account, if he wishes to shelter himself from responsibility, or at the instance of purchasers entertaining, as in this case, fears as to the security of their titles, by reason of the supposed want of jurisdiction in the court which ordered the sale. Besides, the Judge below, being of opinion that the District Court of the United States had jurisdiction over the subject matter, may well have considered it incumbent on him to compel the Recorder of Mortgages to fulfil an official duty by means of a mandamus, although the same result could perhaps have been obtained, by application to that court to enforce its decree. As to the parties holding these mortgages, they have already been cited in the United States Court, and have had an opportunity of urging their objections, if they had any, to the erasure of their mortgages, but they have made none. The question is not, whether this erasure has been rightfully ordered, but whether the District Court was competent to order it, and whether it has consequently become an official duty, on the part of the Recorder of Mortgages, to do the act demanded of him by the appellee.

The jurisdiction of the District Court, sitting in bankruptcy, is defined in the sixth and eighth sections of the bankrupt law. In the sixth section, it is declared, "that the District Court, in every district, shall have jurisdiction in all matters and proceedings arising under this act," "the said jurisdiction to be exercised summarily, in the nature of summary proceedings, &c.;" "and the jurisdiction hereby conferred on the District Court, shall extend to all cases and controversies in bankruptcy, arising between

the bankrupt, and any creditor or creditors who shall claim any debt or demand under the bankruptcy ; to all cases and controversies between such creditors and the assignee of the estate, whether in office or removed ; to all cases and controversies between such assignee and the bankrupt ; and *to all acts matters and things to be done* under, and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy." In the 8th section we find : " that the Circuit Court within and for the district where the decree in bankruptcy is passed, shall have concurrent jurisdiction with the District Court of the same district, of all suits at law and in equity, which may and shall be brought, by any assignee of the bankrupt, against any person or persons claiming an adverse interest, or by such person against the assignee, touching any property or rights of property of said bankrupt, transferrable to, or vested in, such assignee." The powers given by the first of these two sections appear sufficiently broad to enable that court to do any act which may become absolutely necessary for the settlement of estates thrown into bankruptcy ; and the 8th section clothes it with power to decide suits brought by an assignee of the bankrupt, against any person claiming an adverse interest, or by such person against such assignee, touching *property, or rights of property* of said bankrupt transferrable to, or vested in such assignee. If it is shown, that the erasure of the mortgages on the property surrendered, is absolutely necessary to settle a bankrupt's estate in Louisiana, and to do justice to the creditors claiming under the bankruptcy, and that the interests of persons holding such mortgages is an adverse interest touching property vested in the assignee, it will follow that, independent of any other provision of the bankrupt law, these two sections vest in the District Court, the jurisdiction it thought proper to exercise.

It seems to be conceded, that the District Court of the United States is not without jurisdiction *ratione materiae*, when creditors holding mortgages, or other liens, come in voluntarily, and make themselves parties to the proceedings ; but it is urged, that they are not bound by the bankruptcy ; that they can stand out of it if they choose, and pursue their remedy without reference to such proceedings. An essential difference is believed to exist between

the bankrupt law of England and ours. There, it is exclusively a forced proceeding; the voluntary clause is unknown to it; the bankrupt is not required, as he is, under our law, to make a surrender of all his property to the court, for the benefit of all his creditors; no one is in the bankruptcy who does not elect to go there and receive a dividend. If a creditor chooses, he may keep aloof, and retain his remedy in the courts of law. Here, every creditor seems to be made, by the law itself, a party to the bankruptcy; all are cited, and there is an issue joined between them and the bankrupt, who, in consideration of the surrender, sues them for his discharge. But admitting that this right of election may be implied from the terms of the bankrupt law, and that it is exercised without much inconvenience or difficulty in the other states of the Union; yet its exercise in this State, by reason of the peculiar nature of the liens and mortgages, as constituted by our law, is deemed inconsistent with the rights of the mass of the creditors, and destructive of most of the liens and securities intended to be protected, by the last proviso of the second section of the act of Congress.

According to our laws, both the possession and the title of property subject to mortgages, whether conventional, legal, or judicial, remain in the debtor, and the creditors holding these several mortgages, are to be paid according to the dates of the registry of their liens in the office of the Recorder of Mortgages, or according to the date of the acts which give rise to a legal mortgage. Of these three kinds of mortgages, two of them, the judicial and the legal, are general, and affect each and every piece of immoveable property owned by the debtor. If the latter sells any portion of his property, it passes into the hands of the purchaser subject to the amount of the mortgages recorded against the former owner, and the mortgagee can, by a hypothecary action, have the property seized and sold in the hands of the purchaser, unless the latter chooses to free the property by paying the debt. A mortgage, moreover, is, under our law, only an accessory to the principal obligation, and the extinction of the debt carries with it that of the mortgage. Civil Code, Book III, Title 22. As relates to the privileges recognized by our laws, they are most of them allowed only in view of insolvency, and can be exercised

only on the proceeds of the property surrendered by a debtor. These privileges are of different grades and descriptions ; some are general, others are special ; some affect only the moveables of the debtor, some only the immoveables ; and some extend to both moveables and immoveables. From the very nature of these liens and privileges, they can be enforced and settled only in a *concurso*, that is, contradictorily between the several creditors entitled to them. Keeping in view these outlines of our system of mortgages and privileges, let us inquire if the doctrine of election is not wholly inconsistent with it, and would not present an insuperable obstacle to the settlement of a bankrupt's estate in Louisiana.

The act of Congress makes it the duty of the bankrupt, under the penalty of not obtaining his discharge, to place upon his schedule or inventory, all his property without any exception ; and from the date of the decree of bankruptcy, all such property is divested out of the bankrupt, and by force of the same decree, is vested in the assignee appointed by the court. All the property then mortgaged, or subject to privileges, becomes a part of the bankrupt's estate, to be disposed of at such times, and in such manner as may be ordered by the court sitting in bankruptcy, (sec. 9, of the Bankrupt Law) ; while in England and in the other States of the Union, the equity or right of redemption alone, passes to, and vests in, the assignee. It is true, that according to the equity doctrine, the common law mortgage is considered a mere security for the debt, and only a chattel interest ; yet it is a transfer of the property itself, as security for the debt, and a bill in equity is the only remedy of the mortgagor, after payment of the debt, if the mortgagee, having entered, upon the condition being broken, refuses to relinquish the possession. 17 Mass. Rep. 419. 3 Ib. 560. It has been remarked by the appellant's counsel, that though, *in form*, this contract at common law is a sale, it is, *in substance*, nothing else than a mortgage ; but it is *that very form* which makes all the difference, by vesting the legal title in the mortgagee. . This mortgage has some analogy to the contract of sale, with a right of redemption, which is sometimes made in this State, by way of security for the loan of money to be returned within a given time. This contract is also in substance a mort-

gage ; but being in the form of a sale, the property could not be carried into the bankruptcy against the will of the vendee, nothing but the mere right of redemption being transferred to the assignee ; hence, it is necessary for the latter to redeem the property, in order to bring it back into the bankrupt's estate. If he does not, the mortgagee, or vendee under a clause of redemption, has nothing to do with the bankruptcy, and may keep out of it. "Thus," says Blackstone, in his Commentaries, 2d vol. p. 487, "mortgages for which the creditor has a real security in his hands, are entirely safe, for the commission of bankrupt reaches only the equity of redemption. So are also personal debts, when the creditor has a chattel in his hands, as a pledge or pawn for the payment, or has taken the debtor's lands, or goods in execution." Under such circumstances, I can well understand, that the right of election may exist, but where, as in this State, the mortgaged property itself goes into the bankruptcy, it appears to me, that the creditors can have no election, but must follow their pledge, and seek their payment out of its proceeds. From the nature of our general mortgages, and the conflicting privileges existing under our laws, upon an estate surrendered by a bankrupt, it must be obvious to every one, that no settlement can take place, unless the whole estate is reduced to cash ; and that this result cannot be obtained, until the property is released from all the incumbrances bearing upon it. All persons, then, holding such mortgages may well be considered, within the meaning of the eighth section, as having an adverse interest touching the property vested in the assignee. They have the *jus in re*, which Pothier tells us, in his treatise *Du Droit de Domaine de Propriété*, is the right which we have in a thing, by which it belongs to us, at least for certain purposes, (*au moins à certains égards*,)—vol. viii. chap. 1, No. 1, p. 111. "*Il y a*," says he, "*plusieurs espèces de jus in re, qu'on appelle aussi droits réels. La principale est le droit de domaine de propriété. Les autres espèces de droits réels, qui émanent de celui-ci, et qui en sont comme des démembrements*," &c. Among such proprietary rights, he mentions the right of mortgage. Pothier, *loco citato*, No. 2.

This right which the mortgagees have in the property vested in the assignee, is evidenced under our law by an inscription, or

registry on the books of the Recorder of Mortgages, which, unless erased, would prevent the sale of the bankrupt's property, and, consequently, the settlement of the estate. It constitutes, therefore, to my view, such an adverse interest as is contemplated by the eighth section of the law, and upon which the assignee was authorized to bring suit. This section, and the sixth, were clearly intended to clothe the District Court, sitting in bankruptcy, with all the powers necessary to effect a final settlement and liquidation of the affairs of the bankrupt. Upon the whole, I have come to the conclusion that the District Court of the United States acted within the scope of its jurisdiction, and had full authority to make the order, which it did, to the Recorder of Mortgages, and that the latter, in the performance of his official duties, was bound to obey such order, and erase the mortgage in question.

In corroboration of this view of the subject, the counsel for the assignee has called our attention to the last proviso of the second section of the bankrupt act. It is in these words: "that nothing in this act contained shall be construed to annul, destroy, or impair any lawful rights of *married women*, or *minors*, or any liens, mortgages, or other securities on property, real or personal, which may be valid by the laws of the States respectively, and which are inconsistent with the provisions of the 2d and 5th sections of this act." It is said, that although this proviso is general in its terms, it was inserted at the instance of the Louisiana delegation in Congress, in view of the difficulties which would inevitably have attended the operation of the bankrupt law in this State, in consequence of the peculiar character of our privileges and mortgages. Its express object, it is contended, was to secure to the persons therein mentioned, and others similarly situated in Louisiana, the right of being paid out of the proceeds of the property subject to their privileges and mortgages, as they were under the State law, and therefore, to authorize every thing which was necessary to attain that end. Such appears to have been the construction given to this proviso of the law, by the United States District Court in this District. Its rules and regulations have been made in accordance with this construction. Mortgaged property, to an immense amount, has been sold under it, and the rights of the privileged and mortgage creditors have been allowed and

recognized to exist, as they stood under the State law. In conclusion, I must say, that even if I had any doubt on the subject, I would not put upon the act of Congress a different construction from that given to it by the District Court, whose decision is final. In relation to the mutual respect, which, in my opinion, the Federal and State courts should show for the decisions of each other, the Supreme Court of the United States have said: "the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government. Hence, the construction given by this court to the constitution and laws of the United States, is received by all as the true construction; and hence, the construction given by the courts of the several States to the Legislative acts of those States, is received by us as true, unless they come in conflict with the constitution, laws, and treaties of the United States." 10 Wheaton, 160. See also 16 Johnson, 248. 17 *ibid.* 108.

SIMON, J.* I concur in opinion with my colleague, Judge MORPHY, and conclude that the judgment of the Parish Court ought to be affirmed, with costs.

GARLAND, J. For the reasons stated in the opinion read by Judge MORPHY, and for those stated in an opinion which I have prepared in the case of *Clarke, assignee of Zabriskie v. Rosenda and another, ante*, p. 27, I concur in the opinion, that the judgment of the Parish Court should be affirmed.

BULLARD, J., dissenting. I must content myself with expressing my dissent, not having strength to develope, at any length, the reasons on which it is founded. My views, generally, in relation to the late bankrupt law, are expressed at length in the case of *Clarke, assignee, v. Rosenda and another, ante*, p. 27. This case, it appears to me, presents a dilemma. Either the United States Court, sitting in bankruptcy, has, or it has not, plenary jurisdiction over the whole subject of mortgages, and has a right to decide on the rights of mortgagees. If it has, then it follows, that that court may order evidences of mortgages to be erased; and may direct the Recorder, as a ministerial officer, to perform

* MARTIN, J., did not sit on the trial of this case.

the act. Upon that supposition, what has a State tribunal to do with the matter? Since when have the State courts become the auxiliaries of the federal tribunals, and been expected to play so poor a part, as to lend their aid blindly, in registering their decrees and ordering State officers to carry them into effect. I find nothing of this kind in the constitution, or jurisprudence of the United States.

Again: if we are to pronounce ourselves upon the right of second mortgagees, and upon the authority of the Recorder to efface from the record the evidence of their rights, then it must be done with proper parties before us—*auditis audiendis*. Who are the parties before us? None other, as I understand it, than the assignee and the Recorder of Mortgages. None of the parties, whose rights are to be affected by this proceeding, are before us; nor have they had an opportunity to be heard, by forming a *contestatio litis*. In the case of *Gasquet v. Dimitry*, we refused to order the Sheriff to erase the mortgage, without hearing the mortgagee. Our venerable senior, who does not sit in this case, delivered the opinion of the court in that. 6 La. 453.

Does the Recorder of Mortgages wish to shelter himself behind the authority of this court, he must bring with him those whose rights are to be affected by the act required to be done by him. Otherwise, it is clear the mortgagees would not be precluded, either by his acts, or even by the judgment of this court. The Recorder of Mortgages does not represent those whose mortgages are inscribed upon his register. If the mortgagees had been made parties in the Parish Court, they might have denied the existence of any judgment in the District Court of the United States against them. They might have shown, that the proceedings on the part of the first mortgagees were illegal and void, and that, consequently, their rights are not to be impaired. In fine, they might have placed their case in such a form before the court, claiming under the act of Congress to have their rights as mortgagees secured and protected, as, in the event of a judgment here, in the highest State court, against them, they might have prosecuted a writ of error to the Supreme Court of the United States. Instead of that, what have we? An assignee of a bankrupt, who asserts in his favor a judgment of the Bankrupt Court, and a Re-

Benjamin, Assignee, v. Prieur, Recorder of Mortgages.

corder of Mortgages, who has no more interest in the case than the clerk of this court, and who has not, in relation to mortgagees, any *facultas standi in judicio*. I cannot consent to aid in such a proceeding, in which, we either merely carry into effect the judgment of a court of the United States, or decide upon important questions without having before us, as parties, those whose interests and rights are to be affected by our judgment.

My opinion, therefore, is, that the judgment of the Parish Court should be reversed.

Judgment affirmed.

J. P. BENJAMIN, Assignee of Louis Florian Hermann, a Bankrupt, v. DENIS PRIEUR, Recorder of Mortgages for the Parish of Orleans.

APPEAL from the Parish Court of New Orleans, *Maurian, J. Benjamin*, pro se.

Roselius and Grymes, for the appellant.

MORPHY, J. This case presents the same question as that of F. B. Conrad, assignee, praying for a mandamus, *ante*, p. 49, and must receive the same decision, on the same grounds.

Judgment affirmed.

CHARLES MARSHALL JONES v. DAVID SIDLE and another.

The signature of the appellant is not necessary to an appeal bond; it is enough that it be signed by a sufficient surety.

RULE on the plaintiff to show cause why he should not be restrained from proceeding under an execution, issued by the Commercial Court, *Watts, J.*

BULLARD, J. The plaintiff having obtained judgment against the two defendants jointly, they took what they considered a suspensive appeal, returnable on the first Monday in April, 1843, and

which has been returned accordingly, and is now pending in this court. The plaintiff, after the appeal was allowed, and the bond given, took a rule upon one of the defendants, Stewart, to show cause why execution should not be issued, as to him, on the ground that he had filed no appeal bond, as required by law, and in accordance with the judgment rendered against him. This rule was made absolute, and the execution ordered to issue against Stewart, on the ground, that he had not signed the appeal bond, the sufficiency as to the amount and solvency of the surety being admitted.

Thereupon Stewart, by his counsel, applied to this court for a rule on the plaintiff, to show cause why he should not be restrained from proceeding under his execution; and an order was given at the same time to the Sheriff, to desist from proceeding, until the further order of this court.

The reason given by the Judge of the Commercial Court, for ordering execution to be issued, as to one of the debtors, was, that no appeal bond had been filed as to the defendant, Samuel Stewart. This judgment was given after the appeal had been prosecuted, and while it was pending in this court.

The original judgment was, that the plaintiff recover of Sidle \$925, and of Stewart \$925. They had been sued together as Sidle & Stewart. They applied, by the same petition, for an appeal; and it was allowed on their giving bond, with good and solvent surety, in a sum exceeding, by one-half, the amount of the judgment. The bond was given within the proper time, for a sufficient amount, and was signed by a solvent surety. It purports to be signed Sidle & Stewart, but it is admitted that the signature was written by Sidle. The amount is twenty-eight hundred dollars, more than sufficient to cover the whole judgment, as to both defendants. It is clear, that if neither of the principals had signed the bond, it would have been sufficient if signed by a sufficient surety. The true test is this:—could the plaintiff, in the event of his judgment being affirmed on appeal, recover against the surety, the amount of his judgment against Stewart, as well as that against Sidle; and of this, we entertain no doubt. The condition of the bond is, that Sidle & Stewart shall prosecute their appeal, and satisfy such judgment as may be rendered

McKeever v. Keyes and another.

against them. What appeal? from a judgment which condemned each of them to pay \$925, and interest, in a joint action, and on a joint obligation.

We should not think ourselves authorized thus to examine a judgment from which no appeal has been taken, if it did not appear manifest, that at the time it was rendered, the case to which it related was pending in this court; and the law authorizes us to issue any mandate which may be necessary to maintain our appellate jurisdiction. The bond was, in our opinion, sufficient to stay execution, until this court should have pronounced upon the merits of the case. Code of Practice, art. 877.

Let the rule be made absolute; and the order to the Sheriff to desist from proceeding on the execution, be maintained.

G. Strawbridge, for the rule.

Jones, pro se, cited the Code of Practice, art. 573. 6 Mart. N. S. 598. 8 Ib. 393. 6 La. 228. 10 Ib. 271.

ALEXANDER MCKEEVER v. JOSEPH M. KEYES and another.

A rule having been taken on the surety in an attachment bond to show cause why he should not pay the amount of the judgment against his principal, the former, on the return day of the rule, demanded to see the bond, which, having been misplaced, could not be produced; and the parties separated, the rule not having been discharged, made absolute, or extended. Judgment having been afterwards rendered in favor of the plaintiff in the rule, without further notice to defendant, in an action by the latter to annul: *Held*, that a new rule should have been taken, and that the judgment must be annulled.

APPEAL from the Parish Court of New Orleans, *Maurian, J.*

Benjamin, for the plaintiff.

Elmore and King, for the appellants.

MARTIN, J. The defendants are appellants from a judgment action to annul a judgment, which they had obtained against the present plaintiff, as surety of one Shannon. The suit originated in a rule, which they took against the plaintiff in a suit of the present defendants against Shannon, to show cause, why

McKeever v. Keyes and another.

there should not be judgment against him as surety of the then defendant. The rule was returnable on the 12th of February, 1842. On the 5th of May, judgment by default was taken, and confirmed on the 10th, and signed on the 14th. On the 17th of December following, the Parish Court annulled the judgment. The testimony shows, that on the return day of the rule, the present plaintiff and his counsel came into court, and asked to see the bond on which judgment was intended to be taken; that the clerk, and his deputies, made search therefor, but could not find either the bond, or the record of the suit in which it was given; that the counsel of the plaintiffs in the rule, being informed of this circumstance, made an unsuccessful inquiry for the papers, and that the parties separated, it being understood, that the rule would not be acted upon, on that day; that several months after, the counsel for the plaintiffs in the rule, informed the defendant's counsel, that the papers had been found; and that it was intended to proceed with the rule, and was answered, that the latter did not consider himself as still engaged in the suit, and that his client ought to be notified. On this the counsel of the plaintiffs in the rule replied, that they looked upon that as useless, and that they would proceed to take judgment; when they were told, that if they did, and the defendant in the rule sought relief, his counsel would get it annulled. It is admitted that the service of the rule as shown by the Sheriff's return, is the only citation served on the appellee.

It appears to us, that the First Judge did not err. The defendant in the rule was not bound to answer until the bond, on which judgment was intended to be taken, was produced; and when, on the return day, an unsuccessful search was made for it, and the counsel of the parties separated without the rule being discharged, made absolute, or extended, the defendant therein was not bound to attend, until another day was given him. This not having been done for several months his, counsel might well consider himself as discharged, and require the adverse counsel to serve a new rule on his client.

Judgment affirmed.

The State v. The Atchafalaya Rail Road Banking Company.

**THE STATE V. THE ATCHAFALAYA RAIL ROAD AND BANKING
COMPANY.**

The president and directors of a bank have no authority, without the consent of the stockholders, to confess a forfeiture of the charter. But where, in their answer to an application on the part of the State for such forfeiture, they do not deny the grounds of forfeiture set forth in the petition, they must be taken to be true, and a forfeiture decreed accordingly.

APPEAL from the District Court of the First District, *Buchanan, J.*

BULLARD, J. L. J. Wilson, one of the stockholders, is appellant from a judgment of the District Court which declares the charter of the Atchafalaya Rail Road and Banking Company forfeited, under the following circumstances :—

On the 9th of March, 1842, the Attorney General presented the State's petition, charging the corporation with having neglected and refused to pay its notes and other obligations, in specie, for a period of more than ninety days ; with having so mismanaged its affairs, and abused its corporate franchises, as that it had become insolvent ; and, in fine, with having so violated its charter that the same was justly forfeited ; and he prays, that such forfeiture may be declared by a judgment of the court.

Citations were issued and served on the same day, but not returned until the 12th of March. On the 11th the President and Directors answered, that, without admitting or denying the facts averred in the petition, or the legal consequences charged as resulting therefrom, they aver that by the art of incorporation, they were invested with the powers necessary for the construction of a certain rail road described in the 8th section of the act, which provides, that if the said road shall not be commenced within two years, and shall not be finished in seven years from the passage of the act, the same shall be null and void. They confess and admit that the said rail road has not been completed, and that the period allowed for completing it has expired since the filing of the petition in the case ; that finding themselves unable to complete said rail road, they have deemed it advisable to elect the alterna-

The State v. The Atchafalaya Rail Road Banking Company.

tive provided by the act of incorporation of forfeiting their charter; and do consent, that the same be declared null and void as provided therein.

Upon this remarkable confession the court pronounced judgment on the same day, declaring the charter forfeited on account of the neglect of the President and Directors to complete the rail road. The judgment is silent as to any other ground, or cause of forfeiture. It was signed on the 15th.

We are of opinion that the court erred. The President and Directors were incompetent, without the consent of the stockholders, to confess a forfeiture, and thus abandon an act of incorporation, which it was their duty to administer for the interest of the stockholders. They had no authority by a voluntary act, or confession, to surrender the charter of the corporation.

This confession is the more remarkable and unjustifiable, as by an act of the Legislature approved on the 5th of February previous, it was provided, section 7, that if any bank had constructed and completed any public works or improvements, such bank might retain its corporate powers, and all other privileges conferred by its charter, so far only as the continuance of such powers and privileges may be necessary to enable it to retain the property in such works, and to manage and to carry on the same, &c. The 7th section contains a proviso relating expressly to the rail road in question, to wit: "That nothing in this section shall be construed to release the Atchafalaya Rail Road and Banking Company from making the rail road imposed by its charter, *except so far as the State is concerned*, on condition, &c. Acts of 1842, p. 46.

By this we understand, that the stockholders had still a right to require the road to be constructed, notwithstanding a forfeiture of the banking privileges of the corporation.

It is not unworthy of remark at the same time, that there was then pending an action by a number of the stockholders, to compel the Board of Directors to proceed with the work required by the charter; in answer to which the Directors admitted, that they had commenced operations and expended considerable sums. This suit is now pending on appeal in this court.

Jones v. Sidle and another.

The judgment based upon these unauthorized confessions and admissions, is, in our opinion, erroneous. But the defendants in their answer, do not deny the allegations and grounds of forfeiture set forth in the petition. They are to be taken as true, unless denied; and they are clearly sufficient in law, to authorize a judgment of forfeiture.

It is therefore adjudged and decreed, that the judgment of the District Court be avoided and reversed; and it is further ordered and decreed, considering the neglect and refusal of the defendants during more than ninety consecutive days, to pay their obligations, in specie, whereby the charter was liable to be declared *ipso facto* forfeited, that the same be, and it is hereby declared to be forfeited. The costs of both courts to be paid by the defendants.

Preston, Attorney General, for the State.

Hoffman, for the defendants.

Barker, for the appellant.

CHARLES MARSHALL JONES v. DAVID SIDLE and another.

The purchaser of bank stock, which, according to the usage of the bank, could only be transferred to him on his compliance with certain forms, cannot annul the sale, where he has failed to put the vendor in default, after placing himself in a condition to receive the transfer by complying with the regulations of the bank.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Jones, pro se.*

G. Strawbridge, for the appellants.

BULLARD, J. The defendants, being sued on their note, given for the price of certain city property and a number of shares of the stock of the Citizens Bank, pleaded that the plaintiff, their vendor, had failed and neglected to deliver to them the bank stock, which has become greatly depreciated, and cannot be disposed of as originally contemplated by them. They, therefore, pray that the sale may be cancelled and annulled.

This defence did not avail them in the court below, and they
VOL. V.

The State v. The Atchafalaya Rail Road and Banking Company.

are appellants from a judgment condemning each to pay one-half of the amount of their promissory note.

It is clearly shown, as a usage of the bank, that when the purchaser of property, on which there is stock, wishes to have it transferred to him, he must present a petition to the board of directors, and, at the same time, file his title papers for examination; and that the plaintiff could not make a transfer of the stock on the books of the bank, without such previous act of the purchaser. It appears, therefore, clear, that the plaintiff was never put in default; and the loss in the depreciation of the bank stock, in the meantime, cannot be legally chargeable to him. It further appears, that the defendants were offering to make sale of their stock, and might have sold above par; but they do not appear to have required of the plaintiff a legal transfer, when they own themselves in a condition to receive it, according to the regulations of the bank.

The fact that the stock stood, at the time, in the name of Stringer, does not appear to us to make any difference. It was Jones who had bound himself to make the transfer, or to cause it to be made. Nothing shows that the fact of the stock standing in the name of Stringer, formed any formidable obstacle to the transfer to the defendants, if they had required it.

Judgment affirmed.

THE STATE V. THE ATCHAFALAYA RAIL ROAD AND BANKING
COMPANY.

Extra compensation, promised to an attorney employed by the year, at a fixed salary, for the prosecution of certain suits, cannot be recovered before the decision of the suits, where the amount was not promised to be paid in advance.

APPEAL from the District Court of the First District, *Buchanan, J.*

Barker, for the appellants, *H. Bean & Co.*

Wray, for the appellant, *Hoffman.*

The State v. The Atchafalaya Rail Road and Banking Company.

Hoffman, for the Commissioners of the Rail Road and Banking Company.

MARTIN, J. M. W. Hoffman, and Horace Bean & Co., are appellants from a judgment, overruling their respective oppositions to the tableau of distribution, presented by the Commissioners of the Bank. Hoffman's opposition was grounded on the omission of the Commissioners to place him on the tableau, as a creditor, for the sum of five hundred dollars, for a fee in two suits instituted by the Commissioners. One of the Commissioners, French, filed his answer to the interrogatory propounded by the opponent, and admitted, that a majority of the Commissioners promised an extra compensation to the opponent, he being their attorney on an annual salary, subject to the consent and approbation of the court. The District Court decided that the opponent's claim was to be calculated upon the amount to be recovered of the President, Directors and Cashier of the Bank, and securities for their alleged delinquencies, and dismissed the opposition without prejudice to any future claim for the opponent's services. We are not now to test the grounds on which our learned brother restricted the opponent's recovery to the proceeds of a particular fund; but we think, that it was properly disallowed, as the suits on which fees are claimed are not yet terminated, and there was no promise of an anticipated payment, or retaining fee.

Horace Bean & Co. complain of the tableau. *First*, because not placed thereon for \$11,375. *Secondly*, because the allowance to the Commissioners is excessive. The tableau now under consideration, is an amended one. It appears, that these opponents were placed on a preceding one, for the sum which they now claim; and the District Judge has correctly held, that the last tableau is not in opposition to the one on which the opponents have been placed, and that there was no necessity for the introduction of their claim on a succeeding one. The Commissioners put themselves on the tableau for the sum of nine thousand dollars, that is to say, for three thousand dollars each, according to an agreement on record, of the 17th of December, 1842, between the Commissioners and the attorney of the present opponents, by which they were to be allowed that sum yearly. But as their services had not as yet, been rendered for a twelvemonth, the judge reduced the

Vidal v. The Ocean Insurance Company.

allowance proportionably, to wit, to \$7125, or \$2375 each, for nine months and a half. The opponents have contended, that this agreement related only to the compensation for the services of the Commissioners theretofore rendered, and was not to be extended to the compensation for posterior services. The act of the legislature had established an identical mode of compensation with that agreed upon by the parties; and it does not appear to us, that the court erred in making them the same allowance, for services thereafter rendered. The opponents cannot complain.

Judgment affirmed.

MANUEL VIDAL v. THE OCEAN INSURANCE COMPANY.

The assignee of a bankrupt, under the act of 19th August, 1841, who claims the interest of the latter in a suit, may file a third opposition, for the purpose of asserting the rights of the creditors whom he represents. C. P. 396,

One making a third opposition is not required to make an oath in order to obtain an injunction. C. P. 399.

APPEAL from the Parish Court of New Orleans, *Maurian, J. Hoffman*, for the appellants.

L. C. Duncan, for the third opponent.

MARTIN, J. Manuel Vidal having availed himself of the bankrupt law of Congress, Dunbar, his assignee, filed a petition stating, that Robert G. Hobbs having bought at a Sheriff's sale Vidal's interest in the suit against the Ocean Insurance Company, and being subrogated thereto, had caused a *fi. fa.* to be issued, under which certain funds belonging to the Ocean Insurance Company were seized; that Hobbs' purchase was made after Vidal's bankruptcy, and the appointment of the petitioner as his assignee;* that, consequently, the Sheriff's sale was void under

* The petition states, that the sale was made after Vidal had presented his petition to be declared a bankrupt, and not after the appointment of the assignee. R.

Vidal v. The Ocean Insurance Company.

the law of Congress, and in violation of an injunction of the Court of the United States for the Eastern District of Louisiana; the interest claimed by Hobbs being vested in the petitioner, as assignee. Whereupon, he prayed leave to intervene, and file his third opposition, and that the Sheriff might be enjoined from farther proceedings, or the petitioner, as assignee, declared to be entitled to the proceeds of the sale. The injunction was issued accordingly. Hobbs then obtained against Dunbar and his sureties, a rule to show cause why the injunction should not be dissolved, and interest and damages awarded him; and he is appellant from the judgment discharging the rule. His counsel has urged, that the injunction was wrongfully sued out, as the petition is not sworn to, and the case not one in which a third opposition can take place. Code of Practice, art. 396. 3 La. 495. It is proper to begin by the second proposition, so as to follow the order in which they are treated in the Code of Practice. The third opposition lies, when "the third person making the opposition, pretends to be the owner of the thing which has been seized." Code of Practice, art. 396. The third opponent is not required to make an oath in order to obtain an injunction; for, the Code of Practice, art. 399, provides, that "the court may, at the request of the third opponent, enjoin the Sheriff not to proceed to the sale of the property thus claimed, provided such third person gives security to the plaintiff, for such an amount as the court shall determine, to be responsible for all damages which said plaintiff may sustain, should the opposition be wrongfully made." The court did not err in discharging the rule.

Judgment affirmed.

ANDREW ERWIN v. JOHN GREENE and others.

Solidarity must be stipulated expressly. It cannot be presumed. C. C. 2088. So of surety-ship. Ib. 3008.

Defendants purchased jointly certain lots of ground, giving their separate notes, payable at different periods, each for one-third of the price. The act of sale declared, that they were interested in the purchase in the same proportion; and provided "that to secure the payment of the aforesaid notes, the purchasers hereby mortgage the herein described property." Two of the purchasers having paid their notes, plaintiff obtained an order of seizure and sale, against the whole property, for the amount of the remaining note. *Held*, that the obligations of the purchasers, though in the same act, are as separate and distinct as if made by different contracts at different times, each purchaser being only bound for his third of the price; and that the notes of each were intended to be secured by a mortgage on his portion only of the property.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*

SIMON, J. This is an appeal from an order of seizure and sale, granted on the petition of the plaintiff, as transferee of James Erwin, who sold the property to the defendants. The act of sale shows, that four lots of ground, therein described, were offered for sale at public auction, and adjudicated to the defendants; to wit, Peters & Millard, Henry Lockett, and John Greene, for the sum of \$37,800, at a credit of six months without interest, and one, two, three, four, and five years, with six per cent interest per annum, for approved endorsed notes, secured by special mortgage, until final payment. The act of sale was passed accordingly, to the three purchasers, *all present and accepting*, according to a plan deposited in the office of the notary, for and in consideration of the said sum of \$37,800, for which, *three sets of notes*, endorsed by different persons, corresponding with the terms of the adjudication, were given to the vendor; to wit, the notes of Peters & Millard, endorsed by Henry Lockett, those of Henry Lockett, endorsed by Peters & Millard, and those of John Greene, endorsed by James Ogilvie, all paraphed, "*ne varietur*," by the notary. The act of sale further stipulates, that *to secure the payment of the aforesaid notes, the purchasers hereby mortgage and specially hypothecate* the herein described property; and at the

close of the act, it is stated, that "the said purchasers hereby declare, *that they are interested in the herein described property*, as follows, viz: Peters & Millard for the one-third interest, and Henry Lockett, and John Greene, each, for one-third interest." The price had been divided accordingly; and the vendor took the three distinct sets of notes from each of the vendees respectively, in accordance with their respective proportions of interest, and a list of the said notes is contained in the act of sale, forming the gross amount of the purchase.*

The petition represents, that all the notes described in the act as being drawn by Henry Lockett and Peters & Millard, *have been paid*; but that the following described notes, drawn by John Greene, are still due and unpaid, to wit: six several promissory

* The clauses of the act of sale material to the question, are as follows:

"Before me William Young Lewis, notary &c., personally appeared James Erwin who declared, that in pursuance of a public sale, the property hereinafter described and owned by the said appearer, was adjudicated to Peters & Millard, Henry Lockett, and John Greene, for the sum of \$37,800, at a credit of six months without interest, and one, two, three, four, and five years, with six per cent interest per annum, for approved endorsed notes, secured by special mortgage, until final payment," &c. "Now, therefore, in consideration of the premises, the said James Erwin does, by these presents, grant, bargain, transfer, sell, convey and deliver unto Samuel Jarvis Peters and Charles Millard, trading under the firm of Peters & Millard, Henry Lockett, and John Green, all present and accepting, the following described property." &c. "This sale is made agreeably to the aforesaid adjudication, for, and in consideration of the sum of \$37,800, payable as follows:— [Here follows a list of the notes; those of Peters & Millard endorsed by Lockett, those of Lockett by Peters & Millard, and those of Greene by one Ogilvie.] "To secure the payment of the aforesaid notes, with all interest and costs thereon, the said purchasers hereby mortgage and specially hypothecate the herein described property, promising and binding themselves not to alienate or encumber the same to the prejudice of the said act. To have, and to hold, the aforesaid property unto the said purchasers, to their proper use and behoof, forever; and the said vendor, for himself, his heirs, and assigns, unto the said purchasers, their heirs and assigns, the herein described property, against the legal claims of all and every person and persons whomsoever, shall and will forever warrant and defend by these presents, hereby subrogating and transferring to said purchasers, all his rights of warranty and action against his vendor and all preceding vendors, with full power to exercise the same according to law. The said purchasers hereby declare that they are interested in the herein described property, as follows, viz: Peters & Millard for the one-third interest, and Henry Lockett, and John Greene, each, for one-third interest."

notes drawn by Greene to the order of, and endorsed by, James Ogilvie for the sums therein stated, being part of the price of the property sold. The judgment, or order appealed from, orders, that the mortgaged premises described in the petition (the four lots of ground) be seized and sold as prayed for, and according to law.

The question presented in this case, is one of considerable difficulty, and we must confess, that the conclusion which we have adopted is not free, even in our own minds, from objections which may be urged with a certain degree of plausibility; but they have appeared to us more specious than solid, and we feel convinced, that our judgment is based upon a correct application of the true principles of law which should govern this case, and is in accordance with the real intention of the parties at the time of the contract.

On the one hand, it is contended, that the plaintiff's mortgage reserved in the act, and therein declared and stipulated to secure the payment of the notes, extends over all and every part of the property sold, to be exercised on the four lots until the complete payment and satisfaction of the whole price, principal and interest; that the vendor never meant to divide his security; and that the purchasers, although they fixed their respective proportion of interest in the property purchased, as between themselves, by the last clause contained in the act, fully understood, that the *entirety* of the property purchased was to be the security for the purchase money.

On the other hand, it is insisted, that the division of the property, or of the purchasers' interest therein, was provided for in the act of sale; that the vendor consented to such division; that he took the separate notes of the purchasers accordingly; and that it was distinctly and perfectly understood, that the payment of the notes by one of the vendees, would extinguish his obligation, and give him a title free from the vendor's mortgage upon his portion.

It will be conceded, that the obligation contracted by the purchasers of the property ordered to be seized and sold, was a joint one; and that, had they given no notes for their respective portions of the price, they would have been bound jointly for the payment of the purchase money. 13 La. 448. Civil Code, art. 2075.

If so, after being all sued upon their joint contract as required by art. 2080, it is clear, that the two obligors who had paid their proportions, would be discharged from their obligation, and judgment would be rendered in their favor. Civil Code, art. 2082. Here, the contract is not only a joint one by the effect of the law, but each of the obligors has promised respectively and separately for himself, to pay his portion of the price, and has given his own notes accordingly, which have been accepted and received by the vendor. Thus, they contracted several and distinct obligations, which, although contained in the same contract, are by law considered as much individual and distinct, as if they had been contained in different contracts and made at different times, and as such, although created by one act, have no other effect than the same obligations would have had, if resulting from separate contracts. Civil Code, arts. 2073, and 2079. Now, it is a well known rule, that solidarity is not presumed, and that it must be expressly stipulated, Civil Code, art. 2088; and that suretyship cannot be presumed; that it ought to be expressed, and is to be restrained within the limits intended by the contract. Civil Code, art. 3008. The contract, in this case, does not contain any clause which would give rise even to any presumption of solidarity or suretyship. Each of the obligors promised to pay his portion of the price for which he gave his separate notes; and they took care to distinguish, and designate the proportion of their respective interests in the property, in the same act which constitutes and establishes their liability as purchasers. We cannot doubt, that the vendor understood it so, and that he signed the act of sale with the idea, that each of the purchasers was only bound for his third of the price, and that the said third formed the whole extent of his obligation under the contract.

In the case of *Walton & Kemp v. DeLizardi*, 15 La. 593, in which, we confess, the clauses and stipulations of the act of mortgage, were much stronger than those under consideration, and put the question out of the reach of any doubt, we recognized certain legal principles, which, in our opinion, are applicable to the case at issue. We said, that "the mortgage is in its nature indivisible, and is a legal right on the property bound for the discharge of the obligation." Civil Code, art. 3249. This general rule,

which is a very safe one in itself, cannot, it seems to us, apply to the case where two or more persons contract distinct obligations, and promise to pay separately their proportion of the price of property, which, though sold in a lump, is shown by the contract itself, to have been purchased by each for a distinct and separate portion. There are cases to which the rule would very properly apply: for instance, if a man was to buy a piece of property for which he was to give his notes payable in two or more instalments, it is clear, that the payment of one note would not discharge the mortgage *pro tanto*, and that the property would remain wholly mortgaged for the balance of the price. After the death of a mortgagor, although his heirs would only be bound personally, each for his virile portion, the mortgage would continue to exist upon the integral property, until the perfect payment of the debt. But to say, that my property, my portion of interest in it, should be, and remain mortgaged to secure the obligation of my co-purchaser, that in buying it, my right to keep it would depend upon my co-vendees' complying with their separate contracts, would be giving to my obligation the effect of solidarity or of suretyship, which cannot be presumed. Again, as we said in the case of DeLizardi above quoted, an express stipulation is necessary. Here, the contract in its origin was, perhaps, such as to come under the application of the legal rule of the indivisibility of the mortgage; and we are free to admit, that had the sale been passed to the three purchasers, without any division of the price, and without any distinction of interest, the mortgage might perhaps have remained entire and unaffected, until the payment of the whole price; but the parties thought proper to establish in the act the distinct amount to be paid by each, and to specify and designate their respective portions of interest in the property; this was accepted by the vendor; the debt was divided, and the respective notes of the purchasers were taken by him accordingly. Each third became the object of a separate obligation, secured by a mortgage upon the property bought; and such mortgage being only an accessory to the principal obligation, it is obvious, that the extinguishment of the principal obligation, must necessarily operate the release of the mortgage. Civil Code, arts. 3251, 3252.

It has been urged, that the act contains the stipulation, that

"to secure the payment of the aforesaid notes, the purchasers hereby mortgage and specially hypothecate the herein described property." This clause would equally apply to each of the obligations resulting from the entire purchase, in cases in which the obligors stipulate respectively, for themselves, and must be understood in reference to the previous and subsequent stipulations; and thus, it would undoubtedly result, that it means nothing more than that the notes given by each purchaser, are to be secured by a special mortgage on his share, or portion, of the therein described property. At any rate, this might perhaps create a doubt, which cannot benefit the vendor. *In dubiis, quod minimum est sequimur.*

Upon the whole, we conclude from the context of the act, that the intention of the parties was not to become bound for each other, nor as the security of each other, and that the plaintiff has not shown himself entitled to the seizure and sale of the whole property, to satisfy the one-third of the price, due by John Greene. It was the duty of the vendor to have required stipulations to that effect; and having not done so, when it was in his power, we cannot relieve him. *Actore non probante, absolvitur reus.* Another maxim, *in cujus erat potestate legem apertius dicere*, is peculiarly applicable to his case.

It is, therefore, ordered, that the judgment or order appealed from, be so modified as to extend only to the seizure and sale of John Greene's undivided third of the property, described in the plaintiff's petition. The costs of this appeal to be borne by the plaintiff and appellee.

Jeannin v. Millaudon and another.

JEAN BAPTISTE JEANNIN v. LAURENT MILLAUDON and another.

The vendor may be bound in warranty, at least for the restitution of the price, though there be no stipulation to that effect, unless, being aware of the danger, the vendee purchased at his own risk. C. C. 2481.

The act of 13th March, 1837, ch. 94, relative to the roads, and levees, in front of the property of non-residents in the parish of Plaquemines, providing a summary mode of disposing of the property of absent proprietors, the proceedings under it should be closely scrutinized.

APPEAL from the District Court of the First District, *Buchanan, J.*

GARLAND, J. The plaintiff alleges, that he is the owner of several squares of ground in the town of Hancockville, in the parish of Plaquemines, fronting on the Mississippi river, or near thereto, of which the defendants have taken possession, and pretend to be the owners. They, for answer, deny the title of the plaintiff, and set up one in themselves, which, they aver, was acquired at a sale made by the parish Judge of the Parish of Plaquemines, by virtue of an order of said Judge, on the report of the Syndic of said parish, for repairs and work on the road, and levee, in front of said land. They allege, that the sale and the proceedings which led to it, were regular and valid, and give a title to them. They further aver, that said sale was instigated and procured by the public officers of the parish of Plaquemines, and for the benefit of said parish; that the proceeds of the sale are in the hands of the parish officers, or have been applied to the use of the parish; and if the plaintiff succeeds in this suit, that the said parish, represented by the police jury, are responsible in warranty, for the amount of the price, to wit \$3100, paid by them for said land. That body was cited, appeared, and excepted, that the defendants have no action of warranty against them, as they had nothing to do with the case, it not being a matter within their control; that the proceedings which led to the sale of the land, were not within their jurisdiction or superintendence, and that the sale was not made for the benefit of the parish. They aver that they never warranted the title to said land; that a warranty was refused, when de-

Jeannin v. Millaudon and another.

manded by the defendants of the Parish Judge, and that they are not in any manner responsible in warranty. The Judge below, on the trial of this exception or answer, decided, that the police jury was not responsible in warranty in the sale by which the defendants pretend to have acquired title ; wherefore he dismissed that body, from which judgment the defendants have appealed.

From this statement of the pleadings, it will be seen there are several issues between the defendants and the party cited in warranty, which it is necessary to investigate, to come to a correct conclusion. The defendants, among other matters, specially allege, that the money they paid for the land, is in the hands of the parish officers, or has been applied to the use and benefit of the parish. The Judge discharged the party called in warranty, without any evidence, other than the deed made by the Parish Judge. Articles 2480, 2481, 2482, of the Civil Code tell us, that parties are sometimes bound in warranty, although there is no stipulation to that effect, at least for the restitution of the price. If the price, as it is alleged, has been applied to the benefit of the parish, it would seem equitable, in case the defendants shall be evicted, that some one should refund the money they have paid, unless it is shown that they purchased at their own peril and risk.

The sale under which the defendants claim, was made by virtue of an act of the Legislature applicable to the parish of Plaquemines alone. Acts of 1837, p. 89. It provides a very summary mode of disposing of the property of persons residing out of the parish, for failing to keep the roads and levees in repair, in front of their land, and the proceedings of the officers acting under it, should be closely scrutinized. The benefits of the law, if any arise from it, accrue to the whole, or a large portion of the parish, and when a contest arises under it, it is safest to have every party, who may be interested, before the court.

We do not intend to be understood as expressing any opinion, as to the rights of any party in the case ; but, as merely declaring that the inferior Judge erred in dismissing the parties cited in warranty, before he tried the case on the merits. We further understand from the pleadings, that the defendants claim of their alleged warrantors the restitution of the price, only in case of eviction,

Gove v. Breedlove.*

and of its appearing that the price had enured to the benefit of those the police jury represents. Code of Practice, Art. 385.

The judgment of the District Court is therefore annulled and reversed, and the cause remanded, with directions to the Judge to compel the police jury to answer, and to proceed with the trial according to law, the appellees paying the costs of this appeal.

Roselius, for the plaintiff.

Canon, for the warrantors.

Benjamin, for the appellants.

ASA D. GOVE v. JAMES W. BREEDLOVE.

The powers conferred on the Supreme Court, enable it to supervise the legal opinions and judgments of the inferior Judges. They do not extend to the correction of any intemperate language in which they may be expressed, or to the personal department of the Judges, while presiding in their respective courts.

A Judge has no right, in the capacity of clerk to the jury, even at their request, to draw up a verdict for them. He may instruct them as to the form of their verdict. (C. P. 515, 528;) but it is the duty of the foreman to prepare it. Ib. 524. The Judge may tell them, that it is in their power to find either a general, or a special verdict, but it is for them to determine which they will find. Ib. 519, 521, 524.

In a charge to the jury, the Judge must limit himself to giving them a knowledge of the law applicable to the case, abstaining from saying any thing about the facts, or even recapitulating them in such a way as to exercise any influence on their decision. Nor ought he to state his own conclusions from the evidence.

An action to recover a drawback due on certain articles subject to an import duty, and for the value of merchandize detained from the plaintiff, is not an action for the recovery of damages for an offence or quasi-offence, in the meaning of the third section of the act of 14th March, 1839, ch. 17, establishing the Commercial Court of New Orleans; but is within the jurisdiction of that court. C. C. 2294 to 2304.

The 4th section of the act establishing the Commercial Court of New Orleans, so far as it attempts to authorize the Supreme Court to decide on cases in the first instance, and to determine matters not decided on in the inferior court, is unconstitutional. The Supreme Court cannot decide on the merits of a case which has not been acted on by the lower court.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*
GARLAND, J. This action is brought to recover the value of seventy-two barrels of Malaga wine, which the plaintiff alleges

that the defendant, as the collector of the port of New Orleans, detains from him, and also the sum of \$167 50, which he owes him for duty on salt, that was entered subject to draw-back, which sum the defendant refuses to pay, although directed to do so by the Secretary of the Treasury, to whom the question was presented for decision. His whole demand amounts to \$743 50. The defendant excepts to the action being now maintained against him, in relation to the duty on the salt, because, as he avers, the plaintiff claims the same sum of the United States, in a suit pending in the District Court of the United States, in which he is sued on a bond for certain duties. He further avers, that there are, as he believes, in the custom house stores in New Orleans, the number of barrels of wine claimed by the plaintiff, which, he is informed, belongs to him, and which he has no objection to his taking, whenever he complies with the law, and the rules and regulations of the custom house.

The cause was tried by a jury, who, under the particular instruction of the court, found a special verdict in relation to the claim for debenture on the salt exported, declaring that the plaintiff was entitled to it, provided he would, "at the request of defendant, tender at the custom house, the necessary entries in the past tense, and transfer his claim on the government to the defendant." In relation to the claim for the wine, the jury found, that the plaintiff had, on the 16th of January, 1837, given two bonds, payable at three and six months, to secure the payment of the duties, the first of which was paid, and the second was not; and that suit had been instituted on the latter, in the United States Court. That after the second bond became due, the plaintiff demanded the wine, which the defendant refused to deliver, until the duties and charges were paid, which has not been done. The jury then proceed to say, if, upon this state of facts, the court should be of opinion, that they ought to find for the plaintiff, then they find for him \$576, the value of the wine; but if the court should be of opinion, that they ought to find for the defendant, then they give a verdict for him. It appears from the record, that the jury had some difficulty in coming to a conclusion; whereupon, the judge recommended to them to find a special verdict,

and it seems, he wrote it himself, after which, it was signed by the foreman.

The plaintiff moved for a new trial :

First, Because the verdict is in the handwriting of the judge, instead of being written by the foreman of the jury.

Second, Because the verdict is not final, and cannot be executed, nor any judgment given thereon.

Third, That it is contrary to law and evidence.

The defendant, for answer to the application for a new trial, consented to it, without admitting in any way, the right of the plaintiff to recover.

Upon this motion, the Judge of the Commercial Court stated, at considerable length, his views of the case, and gave the reasons why he "acted as the clerk of the jury, in reducing the verdict to writing." He concludes by saying, that as "both parties ask a new trial, and although I think the suit can be perfectly well settled on the present verdict, yet, as they have not appreciated my efforts to bring the matter to a conclusion, and as they seem disposed to wrong each other, they may have my leave to do it ; but as I am not disposed to waste my time, and have my temper tried again, as the suit does not belong to the jurisdiction of the court, being brought on a *quasi delict*, I shall *ex officio* order its dismissal." Whereupon a judgment was rendered, dismissing the case at the costs of the plaintiff, and ordering it to be re-transferred to the District Court, from whence it had been removed. From this judgment the plaintiff has appealed.

The counsel for the plaintiff has called on us, to express our strong disapprobation of the course pursued by the Judge below on this trial. This it is not proper for us to do. Our jurisdiction extends only to a supervision of the legal opinions and judgments of the inferior Judges, and not to the correction of the intemperate language in which they express them, or to their personal deportment whilst presiding in their courts. Whilst we regret the occurrence of such exhibitions, it is not for us to censure those, whose forbearance is often put to severe tests.

We are of opinion, that the Judge had no right to act in the capacity he did for the jury. He had a right to tell them, that it was within their power to find a general, or a special verdict, in

compliance with articles 519, 521, 524, of the Code of Practice ; and it was the duty of the foreman to prepare it. The law guards, with peculiar vigilance, against all attempts to influence the verdicts of juries. The judge may instruct the jury as to the form of giving their verdict, Code of Practice, arts. 515, 528 ; but he should be very cautious in meddling with the facts of the case. Article 516 of the Code of Practice, declares, that in his charge, the Judge must limit himself to giving the jury a knowledge of the law applicable to the case submitted to them, and abstain from saying any thing about the facts, or even recapitulating them, in such a way as to exercise any influence on their decision. This court have said, that the Judge ought not to state what conclusions he draws from the evidence. 7 Mart. N. S. 136. It is the duty of the jury to decide, whether they will give a general or special verdict.

We think the Judge erred in dismissing this case on the ground of want of jurisdiction. The act of the Legislature creating the Commercial Court, gives it concurrent jurisdiction with the Parish Court of New Orleans, except in specified cases, one of which exceptions is, " of suits for the recovery of damages for offences or quasi-offences." B. & C. Dig. p. 234, sec. 1. The Judge considered the case as coming within this exception, and dismissed it from his court. The idea that the court had no jurisdiction, does not seem to have originated with either of the parties to the suit, or to have occurred to the Judge, until he ascertained that his course did not satisfy either of them. We do not think, that the present is an action founded upon any of the articles of the code, relating to offences or quasi-offences. Civil Code, arts. 2294 to 2304. One part of the claim is for money received of the plaintiff illegally, or through error, which creates an obligation to repay it ; the other is, to recover the value of property upon which the defendant alleges there is a lien in favor of the United States. It is not pretended that the plaintiff has sustained any damage in his person, or property, by the fault or tortious act of the defendant.

The counsel for the plaintiff contends, that, if we are of opinion that the Commercial Court has jurisdiction of the case, we

ought at once to give a judgment on the merits, and only remand the cause to have it executed. He refers us to the 4th section of the act creating the Commercial Court, (B. & C.'s Dig. p. 235,) which declares, that "no judgment rendered in said court shall be void for want of jurisdiction: but in case a plea be filed to the jurisdiction, and the same is either sustained or overruled by the court, or that the Judge shall *ex officio* decline jurisdiction, and an appeal be taken, the court to which the appeal is made, shall be bound to decide the question; and in case it be determined that the court had not jurisdiction of the case, the plaintiff shall be condemned by the appellate court to pay all costs of the court of the first instance, even although a judgment in the Supreme Court, may be rendered in his favor." This extraordinary provision is peculiar to the Commercial Court, and, if we understand it correctly, requires of us, in certain cases, to give a judgment, and order it to be carried into execution, by a court, which we may, at the same time decide, has no jurisdiction of the cause. It is not material to analyze this section now, as it is very clear it can not give us authority to decide cases in the first instance, and determine upon issues and points not decided in the inferior court. We can correct the judgments of the inferior tribunals; but we cannot decide on the merits of a case which has not been acted on by the lower court. The constitution forbids such an assumption of authority. There is another insuperable objection to our giving a final judgment. The correctness of the verdict of the jury, is assailed by the plaintiff and defendant, and the verdict itself has been annulled, so that we have no ascertained facts on which we can give a decision.

The judgment of the Commercial Court is annulled and reversed and the cause remanded for a new trial, to be proceeded in according to law; the appellee paying the costs of this appeal.

Carter, for the appellant.

T. Slidell, for the defendant,

EDWARD WILLIAM SEWELL v. JOHN WILLCOX.

The prescription of one year established by art. 2474 of the Civil Code, relates only to actions for a supplement of price on the part of the seller, or for a diminution of price or the cancelling of the contract by the buyer, where there is room for an increase, or reduction of price, from excess or deficiency of measure. This prescription is an exception to that of five years, under art. 3507 of the same code, in relation to contracts in general. It runs against minors from the day of the sale, while that created by art. 3507 in relation to other contracts, commences only from their majority.

Where, by the terms of a sale, the vendor undertakes to procure a certificate from the Recorder of Mortgages showing that no incumbrances exist on the property, before the vendee is to be required to pay, the court will not order the price to be paid, even into court, before the production of such a certificate, though it should be proved that the incumbrances might be paid off out of the price. To do so, would be to alter the contract.

Defendant sold plaintiff property, the price to be paid as soon as certain mortgages thereon should be cancelled. The mortgages not being removed, the latter notified the former that unless they were cancelled, within a given time, he would sue to annul the contract, but made no offer (*offre labiale*) to pay the price. Held, that the vendee was not legally put in default—C. C. 1907; and that as no time was mentioned in the contract within which the mortgages were to be cancelled, the putting of the vendee in default, was an indispensable pre-requisite to the rescission of the contract on the ground of his failure to comply with his obligation to cancel them. Ib. 1906.

APPEAL from the District Court of the First District, *Buchanan, J.*

MORPHY, J. This action is brought by Edward W. Sewell, to cancel the sale of certain lots of ground, made to him by John Willcox. The petitioner alleges, that on the 19th of January, 1837, when this sale took place, there existed, on the property, numerous mortgages to an amount far exceeding the price agreed on, to wit, twenty-five thousand dollars; and that the vendor bound himself, in the act of sale, to raise these incumbrances, within the shortest delay. That, in order to secure the performance of this obligation, it was agreed between the parties, that the notes given for the property should remain deposited in the hands of Raboteau, the Cashier of the Improvement Bank, until all the incumbrances on the property should be erased from the records

of the Recorder of Mortgages. The petitioner further represents, that more than eighteen months has elapsed since the execution of the sale, and that although frequent amicable demands have been made on said Willcox to comply with his agreement, he has hitherto neglected, and still neglects so to do. The petitioner further claims damages, alleging that he has been prevented from improving the property, or making any use of it, fearful of being evicted therefrom by some one of the mortgage creditors; &c. Willcox pleaded the general issue; but before the suit could be tried, he having failed, a supplemental petition was filed making his syndic a party defendant in the suit. The latter answered, averring that the plaintiff was in peaceable possession of the property, and had enjoyed the rents and profits thereof from the day of sale up to the present time, which rents and profits amount to \$3000 per annum; that he is in no danger of eviction from any of the mortgages mentioned in the act of sale, which have been paid and satisfied to a large amount, and are nugatory and of no validity; and that, as syndic of the creditors of John Willcox, he has the power to raise and annul the mortgages, and has offered, and still offers to do it, on the payment of the purchase money into court, or into the Improvement Bank. The syndic further answered, that it cannot be legally ascertained by any judgment between the plaintiff and himself, whether there is any thing due to the persons who appear to have mortgages on the property; and that no further proceedings should be had in the suit until such persons are made parties to it. He finally averred, that he had brought suit against Sewell, and all the mortgage creditors of Willcox, for the purpose of raising the mortgages and causing the price to be paid; and he prayed, that the present action might be consolidated therewith for adjudication between all the parties concerned. To the suit brought by the syndic against Sewell on his notes, and against Josiah Barker and the other mortgagees to compel them to raise their mortgages, Sewell excepted, on the ground that there already existed in the same court a *litispendance* between himself, and the syndic, on the matters and things set forth by the latter as the basis of said suit. This exception was overruled, and the two causes ordered to be consolidated. Of the

several mortgage creditors thus made parties to this controversy, Josiah Barton alone answered, denying the right of Willcox, or his syndic, to intermeddle with his mortgage, which he alleges he holds under a former vendor of the property, and on which he states that he has taken out an order of seizure and sale, against the plaintiff, as third possessor. Under these pleadings and the evidence adduced below, the Judge rendered a decree annulling and setting aside the sale, and allowing the syndic a sum of nine hundred and fifty-eight dollars and thirty-three cents, with the privilege of a lessor. The syndic has appealed.

This case was before us on a former occasion, and was about to be tried, when the appellant interposed in this court the plea of prescription. It was then, at the instance of the appellee, remanded pursuant to article 902 of the Code of Practice. The decision of the Judge, overruling this plea, has been added to the record, and presents the first question to be disposed of. The prescription relied on, is based on article 2474 of the Civil Code. We think that it is clearly inapplicable to the present case. It refers to article 2472, to be found in the same section, which treats of the tradition, or delivery, of the thing sold. This last article allows the buyer the option of giving a supplement of price, or of receding from the contract, when, in consequence of a surplus of measure, there is room for an increase of the price. The prescription of one year, created for this particular case, forms an exception to that of five years established by article 3507 for the rescission of contracts in general. It runs against minors from the day of the sale; while that created by article 3507, in relation to all other contracts, commences against them only from the time of their majority. This short and absolute prescription was found conducive to the security and alienation of immoveable property. Troplong, n. 348. Duranton, vol. 16, n. 237.

It is clear, that this case must be tried between the syndic, and the plaintiff, as if Willcox had not failed, and was the only defendant in the suit. The Judge, we think, erred in overruling the plaintiff's exception, and in consolidating the two causes, thus encumbering the present action with parties and issues not properly belonging to it. Of this, the Judge below became sensible afterwards; for, in his final judgment he pronounces only on the issue

as joined between the plaintiff and Willcox before his failure. The appellee's counsel have endeavored to show, that the mortgages set forth in the certificate annexed to the sale, although apparently exceeding sixty thousand dollars, exist in point of fact only to an amount which could be paid out of the purchase money, if it was brought into court, as prayed for by the syndic. This may be true, but, by the terms of the sale, a clear certificate must be produced *before* Sewell can be bound to pay. To require him first to pay, in order that the money may be used to satisfy the mortgages, would be to make for him a contract different from that he assented to. Well might he answer "*non in hæc fœdera veni.*" The syndic cannot possess more rights than the insolvent, whose assignee he is. Willcox could surely have set up no such pretension.

It has been urged, that this action was premature, because notwithstanding the expression, "*the shortest delay,*" used in the sale, it was well understood that the erasure of the mortgages might possibly be delayed beyond the periods of the maturity of the four notes of the plaintiff at six, twelve, eighteen, and twenty-four months; that with a view to this contingency, it was stipulated that the notes deposited should draw interest, at eight per cent. per annum from their respective maturities, so long as the mortgages remained uncanceled, and ten per cent. per annum for any delay after the plaintiff should have become absolutely bound to pay the price, in consequence of the erasure of the mortgages. We have attentively examined the whole context of the act of sale, in connection with the wording of the notes described in it. The meaning of the several clauses touching the interest to be paid by the plaintiff, is far from being explicit and free from doubt; but whether they authorize the construction put upon them, and the inference deduced from them by the appellant's counsel, it is unnecessary for us to say, as he has urged another ground upon which this case must be decided, to wit: that Willcox had never been legally put in default previous to the institution of the present action. The testimony shows, that the plaintiff's counsel wrote a letter to Willcox, demanding of him the raising and cancelling of the mortgages existing on the property, and notifying him that suit would be brought against him for the annulling of

the contract of sale, in the event of his refusal or neglect to cancel said mortgages. It does not very clearly appear whether this letter was received by Willcox; but, admitting that it reached him, it contained no offer on the part of Sewell to perform his part of the contract, which was to pay the purchase money then due. In commutative contracts, where the reciprocal obligations are to be performed at the same time, or the one immediately after the other, the party who wishes to put the other in default, must offer, or perform as the contract requires, that which, on his part, was to be performed, or the opposite party will not be legally put in default. Civil Code, art. 1907. In *Stewart v. Paulding*, 6 La. 151, we said, that "the rules relating to the steps required to be taken in order to place a debtor *in mora*, considered in regard to some of these provisions, are entirely arbitrary, but being imperative must be obeyed by those who administer justice under the law." As, in the present case, no time was even mentioned, within which the mortgages were to be cancelled, the putting in default of the vendor, Willcox, was an indispensable pre-requisite to the rescission of the contract, on the ground of his failure to comply with his obligation to cancel them. Civil Code, art. 1906. 6 Mart. N. S. 229. 3 La. 382. 6 Ib. 151.

It is therefore ordered, that the judgment of the District Court be avoided and reversed, and that ours be for the defendant in both suits, as in case of nonsuit, with costs respectively; those of this appeal to be borne by the appellee.

Benjamin and Grymes, for the plaintiff.

M^r Henry and A. Hennen, for the appellant.

SAME CASE.—ON A RE-HEARING.

Offers to perform one's part of a contract are, according to the jurisprudence of France, either *labial* or *real*. The latter correspond to our *tender*, which, when followed by a consignment, amounts to payment. An offer may be made without a tender.

An offer by the plaintiff to perform his part of the obligation, is an indispensable preliminary to an action for the rescission of a commutative contract.

BENJAMIN and GRYMES, for the plaintiff. The court has deci-

ded, in the opinion pronounced in this case, that Willcox was not put in default, because the letter, written to him by Sewell, "contained no offer, on the part of Sewell, to perform his part of the contract, which was, to pay the *purchase money then due*." The court goes on to say, that "in commutative contracts, when the reciprocal obligations are to be performed at the same time, or the one immediately after the other, the party who wishes to put the other in default, must offer, or perform, as the contract requires, that which, on his part, was to be performed, or the opposite party will not be legally put in default." That this, with the principles subsequently laid down by the court on the same subject, are perfectly sound, is readily conceded. But it is believed, that a misapplication has been made of this law to the facts of this case, which are peculiar, and some of which had evidently escaped the attention of the court, on this part of the subject.

We take it for granted, because both the contract and the opinion of the court sustain us in this position, that Sewell was not bound to pay at all until *after* Willcox had raised his mortgages and produced a clear certificate. The language of the decision is, "a clear certificate must be produced *before* Sewell is bound to pay—to require him first to pay, in order that the money might be used to satisfy the mortgages, would be to make for him a contract different from that he assented to." This is true, but it is not *all*. It will be seen, by looking at the act, and at the notes, that Sewell was *not bound to pay even then*. It is expressly stipulated, that after Willcox had done this, *i. e.* raised the mortgages, he must make a demand on Sewell, *who is to be allowed thirty days after the demand, in order to raise the money*. The notes read thus: "Thirty days after demand," &c. When the plaintiff required Willcox to raise the mortgage, he was not bound to *offer* to pay, or to do any thing else. By law, and by the article of the code quoted by the court, the party who wishes to put the other in default, must offer, or perform, that which, on his part, was to be performed; but Sewell had nothing to perform, upon Willcox's raising the mortgage. Sewell's obligation to pay, could not arise under the act, till thirty days after the demand. This demand Willcox was prohibited from making, till he produced a clear certificate. Surely, then, there can be no possible

ground for holding Sewell to the obligation of tendering Willcox a payment, in order to put the latter in default; for such tender could be necessary only in the event of its being Sewell's duty to pay, on the cancelling of the mortgage. But as we have already shown, Willcox might have cancelled his mortgages, and remained quiescent for years, without Sewell's being at all bound to pay; inasmuch as the latter's liability, by the very words of the act, and of the notes which he gave, was to arise, only *after a demand of thirty days* subsequently to a release of the mortgage. The decision of the court imposes on Sewell the duty of offering payment *before it was due*; and the court clearly mistakes the fact, when it says, that Sewell's letter contained no offer to pay the *purchase money* then due, for none was then due.

McHenry and A. Hennen, contra, relied on article 1907 of the Civil Code, to show that the defendant had not been put *in mora*, as required by law.

BULLARD, J. A re-hearing was allowed in this case, upon the question, whether there was such a putting of the defendant in default, previously to the institution of this suit, as the law requires, as an indispensable pre-requisite to the recovery of damages, or to the rescission of contracts. The putting in default, consisted in the counsel of the plaintiff writing a letter to the defendant, Willcox, demanding of him the raising and cancelling of the mortgages existing on the property sold by him to Sewell, and informing him, that suit would be instituted against him for the annulling of the contract of sale, in the event of his refusal or neglect to cancel said mortgages. On the former argument, this appeared to us insufficient, because it was not accompanied by an offer, on the part of the plaintiff, to perform the obligations which he had assumed by the same commutative contract.

It is clear, it was not necessary to make a tender of that part of the price, which was to become due after thirty days demand. No one is obliged to make a tender of money, which the person to whom the tender is made, has no right to require or receive; and until the mortgages were cancelled, Sewell was not bound to pay. He had a right to deposit in the Improvement Bank, and stop the interest. But an *offer* may be made without a *tender*. In the French jurisprudence, from which we suppose this doctrine is

copied, offers are either *labiales* or *réelles*. The latter corresponds to our tender, which, when followed by consignment, amounts to a payment. Merlin Repert. *verbo* Offre. But it may be said, if this be merely a *lip offer*—a simple declaration of willingness on the part of the person making it, to comply with his part of the obligations created by the contract—it is doing a very vain thing—a thing which can be followed by no results. There is but one effect which we can imagine might result from such an offer, which is, to preclude the person making it, from afterwards setting up any new ground, or excuse, for not complying with his engagement. Whatever may have been the policy of the law, or the motive of the Legislature—and we have, on more than one occasion, expressed our regret that such subtleties should have found their way into the code—the question with us is, are we authorized to disregard that provision of the code, which requires, on the part of the plaintiff, an offer to perform his obligation, as a preliminary to an action of rescission of a commutative contract. We think we cannot dispense with it.

It is therefore ordered, that the first judgment rendered remain unchanged.

JEAN PUJOL and others v. FRANÇOIS CORREJOLLES.

No appeal will lie from a claim for three hundred dollars, with interest, where the interest, being *ex mora*, began to run only from judicial demand. Const., art. 4, sect. 2. C. P. 91.

APPEAL from the Commercial Court of New Orleans, Watts, J. R. Hunt, for the plaintiffs. Barthe, for the appellant.

MORPHY, J. In this suit, which is on an account for work and labor done, and materials furnished, in repairing the steamboat Pontchartrain, the petitioner claims \$300, with interest, and costs of suit. The interest claimed being *ex mora*, accrued only since the judicial demand. It is, therefore, clear, that the claim was

Lartigue v. Peet and another.

one not exceeding \$300 at the institution of the suit: no appeal can therefore lie. Constitution, art. 4, sect. 2. Code of Practice, art. 91.

Appeal dismissed.

ARMAND LARTIGUE v. ELEAZAR PEET and another.

Where a contract is made for another, subject to his ratification, he will be presumed to have ratified it, unless, on being informed thereof, he immediately repudiates it.

Where a clerk, employed at a fixed salary, for a year, is discharged, without sufficient cause, before the expiration of his time, he will be entitled to recover the whole amount which would be due at the end of his term.

APPEAL from the District Court of the First District, *Buchanan, J.*

Kennicott, for the plaintiff.

Grymes, for the appellants.

MORPHY, J. The petitioner claims \$607 48, as a balance of salary due to him, on the allegation, that on the 24th of October, 1839, he was engaged by the defendants as a book-keeper and general clerk for one year, at the rate of \$1200 per annum, but that on the 13th of May, 1840, when the business season was nearly through, he was dismissed from his employment without any just cause or provocation, and thereby became entitled to his salary for the unexpired term of his engagement. The defence is, that the petitioner was not engaged for one year as alleged; and, moreover, that the defendants were justified in dismissing him, because the plaintiff, having been ordered by his employers to prepare a balance sheet, and being unable to make the books balance, did force a balance, and gave the sheet to the defendants without informing them of any error therein. The cause was tried by a jury. There being a verdict and judgment in favor of the petitioner, the defendants have appealed.

In relation to the time for which the plaintiff had been engaged, *W. S. Morton*, who acted, in the summer of 1839, as the clerk

and agent of the defendants, says, that when he engaged the services of the plaintiff as a clerk, in October, 1839, the understanding and agreement was, that Lartigue should remain with the defendants for one year, at a salary of \$1200 per annum, provided he should suit Mr. North, one of the defendants, who was then absent; and that if he did not suit Mr. North, the contract was to be annulled. It appears, then, that the engagement was made subject to the approval of Mr. North, not as to the amount of the salary to be paid, or the time of its duration, but only as to the choice made of the petitioner as a clerk. If the latter suited Mr. North, he was to receive \$1200 a year, and to remain with the defendants one year. It is proved, that Morton was fully authorized to make the contract; and the plaintiff remained in the employment of the defendants, receiving the above salary, long after the arrival of North, who does not appear to have objected to the choice made by his agent during his absence. There is no principle better settled, than that he, for whom a contract has been made, subject to his ratification, is presumed to ratify it, unless he immediately, on being informed thereof, repudiates it. 11 La. 286. The plaintiff must, therefore, be considered as having been engaged for one year from the 24th of October, 1839, at the yearly salary of \$1200.

On the second ground of defence, it is clear, that if the plaintiff, upon being ordered to make out a balance sheet, prepared one with a forced balance, and delivered it to his employers, without informing them of the errors it contained, thus undertaking to impose it upon them as a true balance, such conduct would have justified his immediate discharge, as it must have had the effect of destroying all confidence in him, and of rendering unpleasant and unsafe all future relations between the defendants and their clerk. But the evidence shows, that a balance sheet having been prepared, by order of North, on a Saturday evening, the plaintiff, who knew that it was incorrect, did not deliver it to his employer for his examination, but being very busy and tired that evening, as he stated to another clerk, placed it on the defendant's desk, in a pigeon hole, intending to correct it the next day with the assistance of one of the clerks; that on the Monday following, he requested William H. North, a brother of the defendant, North, to

Lobdell v. Burke.

assist him in discovering an error he had committed, by calling off the different amounts from the books, saying, that he could not make his balance sheet come out right; that while they were thus at work, North came to the desk, and asked what they were doing, and if the books did not balance. The plaintiff then told him that his balance sheet was wrong, and continued to work at the books to discover the error. He had not yet found it, when, on the following day, he was discharged by North, who, before the disclosure made by the plaintiff, was unaware of there being any mistake in the balance sheet. After plaintiff's discharge, the error was found out, and amounted to \$9 20. No charge of dishonesty is made against the plaintiff, who, from the testimony, appears to have been considered by every one as an honest, faithful, and competent book-keeper, and could, therefore, have had no motive whatever to injure, or deceive his employers. Under such circumstances, the jury was of opinion, that the plaintiff had been discharged without a sufficient cause, and that he was entitled to the balance of his salary for the year. Their verdict is not so clearly erroneous as to authorize us to disturb it.

Judgment affirmed.

JOHN L. LOBDELL v. GLENDY BURKE.

APPEAL by the plaintiff from the District Court of the First District, *Buchanan, J.*

Eustis, for the appellant.

Grymes, for the defendant.

MORPHY, J. This suit is brought to obtain a diminution of the price paid for a gang of thirty negroes, purchased from the defendant, on the ground that the negroes do not answer the description given of them in the act of sale, the adults in general being much older, and the children much younger than they were represented to be. The petition sets forth in detail, this difference of age in a number of the slaves, and affixes to each of them the

diminution of price, which should be made in consequence thereof. It, moreover, claims the value of the slave Jefferson, who, although mentioned in the sale, and included in the price paid for the whole gang, was never delivered to the plaintiff.

The evidence shows that the defendant, having received in payment for a debt of \$25,000, due to him by Warren Offutt, a lot of thirty negroes, then on his debtor's plantation in Arkansas, a sale of them was passed to him in New Orleans, before William Christy, a notary, on the 12th of January, 1839, without his ever having seen the negroes. A few days after, the plaintiff having agreed to purchase of defendant the same lot of slaves, for the same price, the defendant told him that as he had never seen the slaves, and knew nothing personally of their ages and qualifications, he would prefer to delay the passing of the bill of sale until he (the plaintiff,) had seen the negroes, or they were delivered to him on his plantation; but the plaintiff insisted on passing the sale immediately, saying that he was perfectly satisfied with the slaves, and did not like the trouble of returning to the city. The sale was accordingly executed on the 31st of the same month, and before the same notary. This act acknowledges the payment of the price by the purchaser, and the delivery to him of the slaves, whose names and ages seem to have been copied from the sale of Offutt to the defendant, passed a few days before, and to which it refers. An agent, sent by the defendant to Arkansas, received the slaves from Offutt, with the exception of one named Jefferson, who had either run away, or was kept out of view by Offutt, and the agent delivered them to the plaintiff on his plantation, in West Baton Rouge. This person has testified that the slaves appeared to him to answer the description given of them; that they were all active negroes, apparently strong and healthy; and the same account is given of them by a passenger who came down in the same boat with them.

Several neighbors of the plaintiff were produced as witnesses to show, that there was a great difference between the real ages of many of these slaves, and those mentioned in the bill of sale, and to establish the consequent difference in their value. Even were these two facts satisfactorily shown, it is by no means clear, under the circumstances of this case, that the plaintiff would be

Lobbell v. Burke.

entitled to recover. The difference of age complained of, is surely not a redhibitory defect; and the only ground, on which the plaintiff could be relieved, would be that of error, had it been created by any fraud, deceit, or artifice on the part of the defendant to obtain over him an unjust advantage, according to article 1841 of the Civil Code; but, so far from any thing of the kind being pretended, it is admitted, and the evidence shows, that he acted with the utmost fairness and good faith. By insisting upon passing the sale without seeing the slaves, the plaintiff might well be considered as having trusted entirely to the representations of their ages and qualifications, made by the vendor of the defendant, and as having relieved the latter from all responsibility as to any defects, which an inspection of the slaves might have disclosed to him. But be this as it may, the evidence is, in our opinion, entirely too vague, and inconclusive to prove the alleged difference in the ages and value of the slaves. The witnesses, who had never seen the slaves before, formed an opinion of their ages only from their general appearance, a most unsafe and uncertain rule, according to the witnesses themselves, who say that negroes appear generally much younger than they actually are, and that, in judging of their ages only by inspection, mistakes may be committed of from five to fifteen years. All the slaves, moreover, having been sold in a lump, for a sum of \$25,000, without any mention of the relative value affixed to each by the parties, it is not easy to perceive how the witnesses could determine the diminution of price to be made on any of them. Under the facts and evidence in the case, we are of opinion that the jury correctly allowed to the plaintiff only the value of the slave Jefferson, whom the defendant was bound to deliver to him.

Judgment affirmed.

Succession of William Porter—Ann Porter, Executrix, Appellant.

SUCCESSION OF WILLIAM PORTER—ANN PORTER, Testamentary Executrix, Appellant.

Where the petition of a married woman alleges, that she is authorized by her husband to sue, proof of authorization will only be required when specially denied *in limine litis*.

Art. 986 of the Code of Practice, does not apply to a liquidated claim secured by a special mortgage. A mortgage creditor is not bound to bring a suit against the succession, before calling on the curator or administrator for the payment of the debt. A simple order from the Probate Judge is sufficient.

Mortgage creditors of a succession, though it be insolvent, are not bound to wait; they may require the sale of the mortgaged property to be made for cash, provided its appraised value be obtained; and their wish must always prevail, in this respect, over that of the other creditors. C. C. 1163, 1663. C. P. 990, 991, 992, 995.

Where a Probate Judge orders the sale of mortgaged property to be made for cash, it is not necessary that he should insert in the order the condition imposed by law, that its appraised value be obtained. The law itself fixes the amount the property must bring, when the sale is for cash; and unless the appraised value be obtained there can be no adjudication.

A legatee of mortgaged property cannot require to be proceeded against as a third possessor, where it is not shown that she has been put in possession of the property. No part of the property or funds of a succession should be applied to the discharge of legacies, until the creditors are satisfied.

Where the act of mortgage shows that a note secured by it was endorsed when the act was executed, and the note, with the endorsement on it, was delivered to the mortgagor by the mortgagee, the signature of the endorser need not be proved.

A rule to show cause requires no other citation than the notification of the rule. The party against whom it is taken is bound to answer it, within the time fixed, and no judgment by default is necessary to render it absolute, which may be done on the day fixed for its trial.

A rule in the Court of Probates on an executrix, to show cause why mortgaged property should not be sold for cash, taken by the mortgagor, is a summary case, the trial of which is provided for by arts. 1034, 1035 of the Code of Practice.

APPEAL from the Probate Court of New Orleans, *Bermudez, J. J. Mitchell*, for the appellant.

Delery, Contra.

SIMON, J. Madame P. Lacoste having applied to the Court of Probates for a rule upon Ann Porter, as testamentary executrix of William Porter, deceased, to show cause, within ten days from the service thereof, why certain lots of ground, specially mortgaged to secure the payment of a note of \$2000, should not be sold

for cash by the Register of Wills, after the publications required by law, the rule was regularly notified to the executrix; and no answer to the rule having been filed, nor any opposition made, it was made absolute.

On the day after the judgment was rendered, the executrix filed a written motion for a new trial, on the following grounds, to wit: 1st. That the petitioner cannot proceed by rule, as she had done, but by suit.

2d. That no day was fixed for hearing the rule, nor notice of trial given, so that it was heard *ex parte*, and even without a judgment by default.

3d. That by the will of the deceased duly homologated and admitted to probate, the property stated to be mortgaged was, bequeathed to the widow, who was not in community with her deceased husband, and that therefore, said property having passed to a third person who is living, this court is without jurisdiction.

4th. That a sale for cash of the property mortgaged, cannot be ordered.

On the trial of this motion, the executrix produced the will of the deceased, and also his marriage contract, to show that the mortgaged premises had been bequeathed to another person, (to the defendant herself, who was his widow and executrix,) but the court overruled the motion for a new trial, and the executrix excepted. She afterwards took the present appeal.

The evidence shows, that no community ever existed between Ann Porter and her deceased husband; that the premises were specially mortgaged by the deceased in favor of Madame P. Lacoste, the plaintiff in the rule, with the consent and renunciation of the wife, to secure the payment of the sum of \$2000, with interest, which had been loaned by her to the deceased, and for which a note by him drawn to the order of one Bolin, and endorsed by the latter, regularly paraphed *ne varietur* by the notary, was delivered to her. The will of the testator shows, that he bequeathed the mortgaged premises to his wife, whom he also appointed his executrix; but, no evidence has been adduced to prove that the property bequeathed was ever delivered by the Court of Probates to the legatee, or that she is in the possession of it, in any other manner, or in any other capacity, than as executrix. It does not appear that any proceeding ever took place, an

Succession of William Porter—Ann Porter, Executrix, Appellant.

thorizing the widow to take possession of the legacy under the will, so as to sever it from the succession; and the will itself is not shown to have ever been ordered to be executed.

We are called upon to reverse the judgment appealed from, and to remand this cause for a new trial, on the following grounds:

1st. That Madame Lacoste avers, that she is a married lady; and though she states she is separated in property from her husband, we are without evidence either of such separation, or of her authority to sue.

2d. That before proceeding to sell the property, the petitioner ought to have obtained a judgment establishing her claim.

3d. That the order for selling the property for cash, implies that it must be sold for what it will bring.

4th. That the court erred in refusing to allow the appellant, as executrix, to show that the property was bequeathed by the testator to his widow, who, though executrix, ought to have been proceeded against as a third possessor. Art. 990 of the Code of Practice, only applying to vacant estates.

5th. That the petitioner was bound to prove the endorsement on the note, and cannot proceed by executory process, without such proof.

6th. That a new trial ought to have been granted for the reasons contained in the rule, as above stated.

I. This was a matter of exception, which the appellant should have availed herself of, by a special denial. In the case of *Kent v. Monget, adm'r*, 4 Robinson, 172, we held that proof of the authorization of a married woman by the husband, alleged in the petition, should only be required when the defendant excepts to it, or denies it specially, *a limine litis*. It is true, that, in this case, no answer was filed; but this objection is not even contained among the grounds upon which a new trial was asked for, and the alleged authorization of Madame Lacoste by her husband, was not questioned in the court below. We cannot take notice of it on the appeal, unless the exception is shown to have been pleaded in the lower court.

II. We have been referred to arts. 986 and 987 of the Code of Practice, but they are not applicable. The judgment alluded to

in art. 986, is to be obtained, if the claim be not liquidated, or if the testamentary executor has objections to make to it, and refuses to approve it. But this cannot apply to a liquidated claim, secured by a special mortgage. It is clear, that a mortgage creditor is not bound to bring a suit against the succession, before calling upon the curator, or administrator, for payment of the debt, particularly when, as in this case, the act of mortgage imports a confession of judgment. A simple order of the Judge is sufficient.

III. IV. Under the 1663d art. of the Civil Code, the testamentary executor is authorized to proceed to the sale of the property of the succession, and to the payment of the debts thereof, *in the same manner as is prescribed for curators of vacant successions*; and by arts. 992, and 995 of the Code of Practice, the principles contained in arts. 990 and 991, apply to all successions administered by administrators, and what is said in this section of the Code of Practice, (of the settlement of successions,) in relation to the liquidation of estates, applies where such estates are administered *by testamentary executors*. Now art. 990 provides, that it shall be the duty of the several Judges of Probate, on the application of any creditor of a vacant estate, to cause, on the requisite advertisements being made, so much of the property of said estate as is necessary to pay the debts of the same which may be due, to be offered for sale and sold at public auction *to the highest bidder for cash*, if the creditors require it, provided *the appraised value be obtained, &c.* Mortgage creditors of a vacant succession, even if it be insolvent, are not bound to wait, and to consent to any terms of credit; they may require that the sale of the property subject to their mortgage be made *for cash*, and their wish, in this respect, shall always prevail over that of the other creditors. Civil Code, art. §1163. With these rules, which are to govern in cases of testamentary successions, how can the appellant pretend, that Madame Lacoste has no right to require the sale of the premises for cash? How can she delay the payment of the mortgage debt? The rule under consideration was applied for, by virtue of a right allowed by law to all creditors of successions, and specially to mortgage creditors; and, we think, that from the

Succession of William Porter—Ann Porter, Executrix, Appellant.

positive terms of the law, it could not be refused. *Towles' Adm'r v. Weeks et al.* 7 La. 317.

It has been urged, that the ordering of the sale for cash, implies that it must be sold for what it will bring. We presume that the Judge, *a quo*, in ordering the sale of the mortgaged property, understood and intended that it should be made according to law. There was no necessity for inserting in the judgment the condition, *provided its appraised value be obtained*. The law itself fixes the amount which the sale must bring, when made for cash; and it is clear that the property cannot be adjudicated for cash under its appraised value.

The appellant has also contended, that she must be proceeded against as a third possessor, and not as executrix. It has not been shown that the property mortgaged was out of the succession, and that the legatee had been put in possession of it. Nay, it seems to use that this is urged by the appellant with bad grace. She is herself the executrix and legatee; she knows that the plaintiff's mortgage bears on the property bequeathed; and it is a well settled rule, that no property, no part of the funds of a succession, ought to be applied to the discharge of legacies, before the creditors are satisfied. 3 Mart. N. S. 707.

V. The act of mortgage shows, that the note was endorsed when the mortgage was executed. This was acknowledged by the deceased, who delivered it to the mortgagee with the endorsement upon it. There was no necessity for proving the signature of the endorser.

VI. A rule to show cause requires no other citation than a notification of the rule. The defendant was bound to answer it within the delay therein fixed, and no judgment by default was necessary to make it absolute. This is a summary proceeding provided for by arts. 1034 and 1035 of the Code of Practice, the trial of which may be gone into on the day of the expiration of the delay. The law says that summary cases in the Courts of Probate, shall be heard every day, and as often as may be necessary. Here the appellant was notified to show cause within ten days from the service of the rule, and it was her duty to appear accordingly. See case of *McKeever v. Keyes and another*, ante, p. 61.

Judgment affirmed.

JUNE, 1843.



Slidell v. Pritchard and another.

JOHN SLIDELL v. GEORGE W. PRITCHARD and another.

An obligation with an unlawful cause, can have no effect. The cause is unlawful when forbidden by law, *contra bonos mores*, or contrary to public order. C. C. 1887, 1889.

Any contract or agreement between an insolvent and one of his creditors, the effect of which is to secure to the latter an undue preference over the other creditors, or to procure for him a renewed claim upon the future property of the debtor, in consequence of which agreement, the preferred creditor's opposition is withdrawn, is illegal and fraudulent, and cannot be enforced. It matters not as to the nature of the opposition, if its withdrawal be the consideration or cause for which the preference is given. Thus, an agreement in consideration of the withdrawal of an opposition to the sufficiency of the security offered by an insolvent, who had been appointed syndic of his own creditors, though the opposition was made after the insolvent had obtained his discharge, of the benefit of which he could not be deprived by any subsequent opposition, is illegal and void. It is sufficient that an undue advantage is derived from it by one of the creditors. The object of the law is, that the rights of all the creditors should remain in the state they were in, at the time of the insolvency; that no change should take place so as to favor any; and that the effects surrendered, and the property subsequently acquired, should be equally divided between the insolvent's former and subsequent creditors, according to the nature, rank, and origin of their respective claims at the time of the surrender, or of the contracting of the subsequent debts.

Money paid to a creditor, in pursuance of an illegal agreement with an insolvent, who had been appointed the syndic of his own creditors, to secure the payment of the creditor's claim, in consideration of his withdrawing an opposition to the sufficiency of the security offered by the syndic, cannot be recovered back, either by the debtor, or by an assignee of his property, under a bankrupt law, suing for the benefit of the creditors, or by a security, who may have paid the amount so reclaimed. Though the cause of the agreement was unlawful, it originated in a natural obligation, on which no action could be founded, but which sufficed to prevent the recovery of the money back, when once paid. C. C. 2281, 2282.

APPEAL from the Commercial Court of New Orleans, *Watts, J. T. Slidell*, for the appellant.

Bradford and Wray, for the defendants, contending that the contract, out of which the plaintiff's claim originated was illegal, and that the money already paid to him under it should be refunded, cited Civil Code, arts. 1887, 1889. Chitty on Contracts, 521, 523. 1 Story on Equity, 297, 370, 371, 372. *Jackson v. Davison*, 4 Barn. & Ald. 691. *Murray v. Reeves*, 8 Barn. & Cress. 854. *Rogers v. Kingston*, 2 Bing. 441. *Wiggen v. Bush*, 12 Johns. 306. *Perry v. Frilot*, 6 Mart. N. S. 217.

Leggett v. Peet et al., 1 La. 297. *Robinson v. His Creditors*, 1 Rob. 454.

SIMON, J. The plaintiff seeks to recover the amount of sundry promissory notes, drawn by George W. Pritchard, to the order of Joseph Tagert, Jr., and endorsed by the latter. Three of the notes sued on, are dated the 31st of May, 1839, and the fourth note is dated the 4th of November, 1840. They amount altogether to the sum of \$2149 66; and were all duly protested for non-payment, at maturity

The defendants resist this claim, on the following allegations: That there was no consideration given for the notes sued on, or, if any, that the same was illegal and void. That the maker of the notes sued on, having sued his creditors for a voluntary surrender of his property, was elected syndic of his creditors, and gave bond according to law. That the plaintiff, who was one of the creditors, made opposition to the security offered by Pritchard, with a view of coercing said Pritchard into a compromise. That on the 31st of May, 1839, thereunto persuaded and induced by the plaintiff, Pritchard delivered to him his six notes, each for \$583 22, payable at certain periods, endorsed by his co-defendant Tagert. That upon obtaining said notes, plaintiff withdrew his opposition to the security offered by the syndic. That two of the notes were taken up by the defendants, who paid also a sum of \$183 22, on account of the third note, in lieu of which another note of \$400 was given to the plaintiff, as the balance due thereon;—and that the notes sued on, are the same which were given in consideration of the withdrawal of the opposition, and of the renewal of one of them.

The defendants further aver, that the payments by them made, amount to \$1349 66; that no consideration, valid in law, was ever given for the notes; that the contract being *nudum pactum*, is not binding upon them; and that they are entitled to recover back from the plaintiff the money already paid on said notes.

The answer further states, that the claim originally held by the plaintiff against Pritchard & Co., consisted of five notes of \$791 12 each, drawn by the late firm of Puech & Duplessis, and endorsed by G. W. Pritchard & Co., upon which judgment had been obtained by said plaintiff, against the drawers, in the Com-

mercial Court; that a certain receipt was given by plaintiff, for the notes sued on, and the other notes taken up, from the tenor of which it appears, that the defendants are liable merely as sureties of the debt of Puech & Duplessis; that said plaintiff might have satisfied his judgment against said firm, had he taken out execution, and seized and sold certain property held under mortgage arising from the registry of said judgment; and that, owing to the plaintiff's neglecting to collect his debt, when it was in his power to do so, the defendants are discharged from all liabilities as sureties of said debt, &c.

They pray for judgment cancelling the notes sued on, and that they may recover from plaintiff the sum of \$1349 66, with interest, on their reconventional demand.

The plaintiff answered the defendants' reconventional plea, by explaining the circumstances under which the notes were executed, and the receipt given; showing that they were so executed at the same time that the opposition by him made to the security offered by the insolvent syndic was withdrawn. He alleges, that said opposition was made, because said security was utterly insufficient, and because he feared that Pritchard would not faithfully discharge the trust confided to him; and he adds, that Pritchard, having given notes for the balance due by him, with a satisfactory endorser, there was no longer any motive for continuing the opposition, and, consequently, it was withdrawn.

The inferior tribunal rendered judgment against the plaintiff on the principal demand; and ordered, that on the demand in reconvention, G. W. Pritchard recover of the plaintiff, the sum of \$1349 66, with legal interest. From this judgment the plaintiff has appealed.

The consideration of the notes sued on, and of those which were taken up by the defendant, Pritchard, is fully established by the evidence. Nay, it seems even admitted in the pleadings, that those notes were executed with a view to effect a compromise between the plaintiff, and the insolvent syndic, in consequence of the opposition which had been made by the former to the sufficiency of the security offered by the latter, and that the opposition was withdrawn, after the delivery of the six notes to the plaintiff.

From the facts of the case, and the state of the pleadings, two questions have been raised :

1st. Was the withdrawal of the opposition, in consequence of which the notes were given, such an illegal consideration as to invalidate the contract, and destroy the plaintiff's right of recovery ? Was it a fraud upon the statute, creating a preference, secured to the opponent, to the prejudice of the insolvent's former and subsequent creditors ?

2d. Can the defendant, Pritchard, or his assignee, (made a party to this suit during the pendency of the appeal,) be allowed to recover back the money paid to the plaintiff, in execution of the insolvent's renewed obligation ?

I. One of the principles applicable to all civil obligations is, that an obligation, with an unlawful cause, can have no effect ; and the cause, says our Code, is illicit when it is forbidden by law, when it is *contra bonos mores*, or contrary to public order. Civil Code, arts. 1887, 1889. Under these principles, it has been repeatedly held in our jurisprudence, that any contract or agreement, made between the insolvent and one of his creditors, having the effect of securing to the latter an undue preference over the other creditors, or of procuring him a renewed claim upon the future property of the debtor, in consequence of which agreement, the preferred creditor's opposition is withdrawn, is illegal and fraudulent, and cannot be enforced. 6 Mart. N. S. 217. 1 La. 297. 1 Robinson, 454. It matters not as to the nature of the opposition, if its withdrawal becomes the consideration, or *cause*, under which the preference is obtained ; and it suffices, in our opinion, that an undue advantage is derived from it, in favor of one of the creditors, to consider the new contract as made in fraud of the opponent's co-creditors, or of the insolvent's subsequent creditors. The object of the law is, that the rights of all the creditors of an insolvent, should remain in the same state they were in at the time of the insolvency ; that no change should take place so as to favor any of them ; and that both the effects surrendered, and the property subsequently acquired, should be equally divided, under our insolvent laws, between the insolvent's former and subsequent creditors, according to the nature, rank, and origin of their respective claims, at the time of the surrender, or of the con-

tracting of the subsequent debts. Chitty, on Contracts, p. 225, says : "An agreement between an insolvent and one of his creditors, (consenting to, or signing with other creditors, a deed, or other instrument of composition,) that the insolvent, or his friends, should pay a further sum of money, or give a better or other security, than such as is stipulated for in the deed, is void, as a fraud on the other creditors ; for where the creditors, in general, have bargained for an equality of benefit, and mutuality of security, it shall not be competent for one of them to secure any partial benefit or security to himself." And at page 226, he says : "Any agreement between the insolvent and one of his creditors, to secure to the latter a claim on the future effects of the debtor, in consideration of the creditor's withdrawing his opposition to the discharge, or otherwise, is void, as a fraud on the other claimants." See also Story on Equity, vol. i. p. 370. 2 Bingham, 441.

Now, in this case, what was the nature of the opposition, the withdrawal of which, became the consideration of the notes sued on ? It was an opposition to the appointment of the insolvent himself, as syndic of his own creditors ; or, in other words, to the sufficiency of the security, without which he could not act as syndic. This opposition, though made by one creditor, was to be for the benefit of the mass. The knowledge which the plaintiff had of the utter insufficiency of the securities offered, would have turned to the advantage of all the creditors ; and the concealment of such knowledge, by the withdrawing of the opposition, was made the consideration of a contract, by which the plaintiff was to acquire a superior claim on the future effects of the insolvent. It seems to us clear, that such contract cannot receive any sanction at our hands.

It has been urged, that the opposition was not made to the insolvent's discharge, but only to his acting as syndic ; that Pritchard, syndic, and Pritchard, insolvent, are not the same ; and that to oppose the discharge of the insolvent, or the security of the syndic, are not the same. This distinction appears to us unsound, and is more specious than solid. It is true, that the opposition was made after the insolvent had obtained his discharge, under our insolvent laws, of the benefit of which he could not have been deprived by any subsequent opposition ; but the result

was the same, to wit, a preference granted and secured to the opponent, amounting to a fraud upon his co-creditors, and a fraud upon the law. This preference is prohibited by law; and the contract by which it is obtained, cannot be viewed in any other light but as an illicit one. The cause which gave rise to it, was one which concerned the interest of all the creditors; and the withdrawal of the opposition, being by itself injurious to them, could not be made the consideration of an obligation by which their rights were to be subsequently affected. We agree with the Judge, *a quo*, in the opinion, that "the bargain was made in relation to an important part of the insolvent proceedings, and one in which all the creditors were interested, that it should be conducted in a fair and open manner." We conclude, that no benefit can be legally derived from such a bargain.

II. This is one of those cases in which courts of justice ought not to interfere to relieve either party, according to the maxim, "*Ex turpi causa non oritur actio*." 4 Mart. 49. 6 Ib. 548. 3 Ib. N. S. 46. 7 Ib. N. S. 423. It follows, therefore, that if the law denies to the plaintiff the right to recover in this action, it also precludes the defendant from recovering back what has been paid in execution of the illicit contract. So, in the case of a gambling debt, the law grants no action for the payment of what has been won at gaming, but it also refuses to suffer the loser to reclaim what he has voluntarily paid. Civil Code, arts. 2952, 2953. So, usurious interest cannot be enforced, but when once paid, cannot be recovered back. So, even in the case of a man's having received a sum of money to commit a crime, Toullier, vol. vi. No. 126, says, "*Si la somme qui en était le salaire a été payée en vertu de la convention, celui qui l'a donnée, ne peut la répéter; le mal est fait, et la faute commise ne peut être un titre ni un prétexte, pour répéter ce qui a été donné.*"

But, in this case, the obligation cannot be considered as an immoral one, in the true sense of the word. It was one with an unlawful cause; that is to say, forbidden by the civil law. Its origin was, at least, a natural obligation, from which no action could be derived, but which is sufficient to prevent the recovery of what may have been paid in execution of it. Our law says: "*to acquire the right of reclaiming what has been*

paid, it is necessary that the thing paid be not due in any manner, either civilly or naturally; and a natural obligation to pay, will be sufficient to prevent the recovery. Civil Code, art. 2281. Article 2282 provides, that "a thing not due is that which is paid on the supposition of an obligation which did not exist, or from which a person has been released." Surely, it cannot be pretended that Pritchard was, by his surrender under our laws, released from the payment of his debts. He was only discharged from imprisonment, but his obligations still existed; and if, subsequently, he thought proper to satisfy them, although he was not legally bound to do so, except in the manner prescribed by law, in case of his acquiring new property, this cannot entitle him to reclaim the amount by him paid in execution of an obligation from which he was not released. Toullier, vol. 6, Nos. 387, 388, and 392. It seems to us incorrect to say, that for the same reason that the law repudiates the enforcing of the illegal agreement, which took place between the plaintiff and the defendant, *a fortiori*, ought this court to allow an action to recover back the money paid in compliance with it. The rule is: *si ob turpem causam promiseris Titio quamvis si petat, exceptione doli mali, vel in factum summovere eum possis; tamen si solveris, non posse te repetere*. And the reason is, *si et dantis et accipientis turpis causa sit, possessorem potius esse: et ideo repetitionem cessare, tametsi ex stipulatione solutum est*. Dig., De Condictione ob turpem causam, lib. 12, t. 5, l. 8. This rule is clearly in accordance with the principles of our law, and is fully applicable to the present case.

It has been said, that the present suit is now prosecuted by the assignee, for the benefit of the mass of the defendants' creditors; and hence, it was argued, that the objections against a recovery by the defendants, of the money by them paid, do not apply to a recovery by the assignee, who is not liable to any exception as *particeps criminis*. There is no evidence in the record, showing that the defendants had taken the benefit of the bankrupt law. This results only from a suggestion that was made by their counsel, that it was necessary to make their assignee a party to this suit. But, supposing the fact to exist, and to have been legally established, it cannot operate any change in the rights of the par-

Stanton v. Parker.

ties. It is clear, that the reconventional demand set up by the defendants cannot be successfully sustained; and we can see no good reason why their assignee should acquire any greater right. He must prosecute the defence of this suit as he found it; and it seems to us, that the plea, that the payment made was injurious to the defendants' new creditors, cannot avail the assignee, whose duty it is to exercise the rights and actions of the bankrupt, in the situation in which he finds them at the time of the bankruptcy. If the defendants cannot claim the refunding of the amount by them paid, the assignee cannot. The defendants' subsequent creditors never acquired any right to the money reconvened. This money cannot be considered as belonging to the bankrupt's estate. It had been paid long before the opening of the bankruptcy; and, at any rate, it cannot make a part of the actions, rights, and credits assigned by the insolvent to his creditors; since the debtor had none to exercise.

It is therefore ordered, that the judgment of the Commercial Court, so far as it rejects the plaintiff's demand, be affirmed; that as to the reconventional demand, which was sustained and allowed by the inferior court, said judgment be annulled and reversed, and the reconvention rejected; and that the costs in the court below be paid by the plaintiff and appellant; those in this court to be borne by the defendants and appellees.

JOHN STANTON v. JAMES C. PARKER.

Where a witness states, that he does not know the general character and standing of a person offered as a witness, he cannot be asked whether he would believe the latter on oath. The reason of the rule is, that no one is supposed to be always ready to explain particular actions suddenly objected against, but every one is presumed always to have within reach evidence of general good character and demeanor.

Where one seeks to discredit a witness, the proper question is, whether from his knowledge of the general character and standing of the witness, the person interrogated would believe him on oath.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*

Hoffman, for the plaintiff.

Preston, for the appellant.

BULLARD, J. This is an action brought for the liquidation and final settlement of an alleged partnership in the sale of ice between the partners, and for the recovery of the balance due to the plaintiff. The defendant denied the existence of the partnership, and that issue was tried by a jury, who found in favor of the plaintiff. Auditors were then appointed, who reported a balance in favor of the plaintiff, which being contested, the matter was again tried by a jury, who sustained the result of the operations of the auditors within a few dollars. The court being satisfied with the verdict, judgment was rendered accordingly, and the defendant has appealed.

An examination of the books kept by the partners, together with the other evidence, satisfies us, that no such error has been committed as to make it our duty to reverse the judgment. The partnership was very satisfactorily shown.

But the defendant has brought to our notice a bill of exceptions, from which it appears, that after several witnesses had testified, that they were not acquainted with the general character and standing of one Cook, who had been summoned as a witness on the part of the plaintiff, the defendant's counsel proposed to ask the witnesses, whether they would believe the said Cook on his oath? This question was objected to, and overruled.

The Court did not err. A witness who does not know the general character of another witness, cannot be permitted to testify as to his own belief of his credibility. The proper question when it is sought to discredit a witness is, whether from the knowledge of the general character and standing of the witness, the person interrogated would believe him on oath. Now, if such person has no knowledge of the general character and reputation of the witness, it is clear, that he cannot know whether he be unworthy of belief, on the score of general bad character. The reason of the rule is, that no one is supposed to be always ready to explain particular actions suddenly objected against, whereas, he is always presumed to have within his reach, evidence of general good character and demeanor. *Greenleaf on Evidence.*

Judgment affirmed.

Delavigne, Syndic, v. The City Bank of New Orleans.

JOH V C. DELAVIGNE, Syndic of his own Creditors, v. THE CITY
BANK OF NEW ORLEANS.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Bodin*, for the appellant.

Lockett and Micou, for the defendants.

BULLARD, J.* This case was before us in December, 1840, and was then remanded for a new trial. 16 La. 471. The second trial resulted in a judgment for the defendants, and the plaintiff has appealed.

It was already shown, that the note confided to the Bank for collection at Natchitoches, was to be transmitted to that place by steamboat at the risk of the plaintiff; that it never reached the hands of the Cashier of the Branch at that place, and that a certificate of deposit for \$400, was enclosed in the same letter. The Commercial Court was satisfied from the evidence, that the note was put on board the steamboat directed to the plaintiff, by the runner of the Bank, and that the loss was afterwards advertised.

It is true, there is no positive evidence that the letter was placed on board; but the Cashier testifies, that when the plaintiff indicated a boat about to depart for Natchitoches, he wrote to the Cashier of the Branch at that place, enclosed the note and the certificate of deposit, and handed the packet to the runner. The runner swears that he has no particular recollection of the transaction, but that he never neglected to put letters on board steamboats, according to the orders of the Cashier. The court, in our opinion, did not err in concluding from this evidence, that the letter was put on board, and that the note was lost while at the risk of the plaintiff.

Judgment affirmed.

* MORPHY, J., being interested in the question, did not sit on the trial of this case.

JAMES KNOX v. JOHN LIDDELL and others.

The provision of art. 2256 of the Civil Code, that "parol evidence shall not be admitted against or beyond what is contained in the acts, nor on what may have been said before, or at the time of making them, or since," is not confined to acts relative to the transfer of immoveable property or slaves, nor to authentic acts.

APPEAL from the District Court of the First District, *Buchanan, J.*

This was an action to recover \$398 11, with interest, the price of certain goods, for which the defendants are alleged to have become responsible. The defendants pleaded payment, and produced a receipt in full of all demands, signed by the plaintiff. The only question presented by this case was, as to the admissibility of parol evidence to contradict the receipt.

Elwyn, for the plaintiff. The decisions of this court, prior to the enactment of our present Civil Code, were very strong against the admission of parol proof to vary, enlarge, or contradict a written agreement, even with regard to personal property. Since the adoption of the present Civil Code the doctrine has been modified, and the rules of the common law apply to the interpretation of all agreements, except where a special provision of the Code interferes. Commencing with the case reported in 8 Mart. N. S. 541, where the Court says—"the act is a *private*, not a *public* act; the prohibition in our code against the reception of evidence against, or beyond what is contained in a written instrument, applies particularly to those which relate to real estate, &c."—and following all the cases down to 1 Robinson, we find none where the strict doctrine of inadmissibility is applied to contracts relating to personal property. The case in 19 La. 409, relates altogether, on this point, to real estate. The code of 1808 contains no article similar to art. 1940 of the present Civil Code, which declares, in the fourth division, that "all the articles of this section, (on the interpretation of contracts,) contain rules established by law for discovering the *intent*, when either the words of the agreement are ambiguous, or circumstances render it

doubtful. They apply equally as well to verbal as to written contracts."

Van Matre, for the appellants. The court erred in admitting parol evidence to contradict the terms of the receipt. *Adams v. Gay*, 5 Mart. N. S. 549. *Chew v. Chinn*, 7 Ib. N. S. 532. *Clamagaran v. Sacerdotte*, 8 Ib. N. S. 533.

MARTIN, J. The defendants and appellants have placed this case before us, on two bills of exceptions taken to the admission of the testimony of Jacob A. Otto. Thomas A. S. Doniphan and William Cannon offered to explain, or contradict, what is expressed in a receipt signed by the plaintiff, and to state what was said before, at the time of, and since the signing of said receipt. It appears to us that the court erred. The Civil Code, art. 2256, provides, that "parol evidence shall not be admitted against, or beyond what is contained in the acts, nor on what may have been said before, or at the time of making them, or since." It has been urged, that the acts, spoken of in this article, are those only which are mentioned in the preceding one, that is to say, those which relate to the transfer of immoveable property or slaves; and the counsel has attempted further to restrict the article to authentic acts. This is contrary to the settled jurisprudence of the State. *Gale v. Kemper's heirs*, 10 La. 205, 209. *Keys et ux. v. Powell*, 9 La. 572. *Maignan v. Gleises*, 4 La. 1: 5 Mart. N. S. 1. 8 Mart. N. S. 200. *Bouligny v. Urquhart*, 4 La. 29. 6 La. 255. 7 La. 333. 8 La. 290.

It is therefore ordered, that the judgment be annulled and reversed, and the case remanded for further proceedings, with directions to the District Court to forbear admitting the testimony excepted to; the plaintiff and appellee paying the costs of this appeal.

MARGARET JANE WINSTON v. R. W. FOSTER, Captain, and others, owners of the Ship St. Mary.

The act of 25 March, 1840, chap. 80, amending the acts previously in force relative to the transportation of slaves out of the State, against the will of their owners, is one of great severity, and must be strictly construed.

The presumption created by the first section of that act does not exist, where a runaway slave, concealed on board of a vessel, is discovered by the captain, and not by the owner of the slave, and the former pursues the course pointed out by law for restoring the slave to his owner, and the latter actually recovers possession of him.

Where a slave, concealed on board a vessel, is carried away and lost to the owner, the master and owners of the vessel will be responsible for his value, though he was received on board by a person employed on the vessel, contrary to the orders, and without the knowledge of the master and owners thereof. The latter are answerable for the damage occasioned by the acts of those they employ, and cannot excuse themselves on the plea, that they were done contrary to their orders, and without their knowledge. C. C. 2299.

APPEAL from the District Court of the First District, *Buchanan, J.*

MORPHY, J. The defendants, owners of the ship *St. Mary*, prosecute this appeal from a judgment decreeing them to pay a fine of \$500, under the provisions of the act, approved March, 25th, 1840, "to amend the several acts passed for the purpose of preventing slaves from being transported or conducted out of the State, against the will of their owners."

The material facts of the case, as shown by the evidence, are, that on the evening of the 24th of May, 1840, the ship *St. Mary*, Captain Foster, was towed down the river by the tow-boat *Tiger*, under the command of J. Beebe; that on the next morning, being about twenty miles from the mouth of the Mississippi, Captain Foster discovered a negro on board of his ship; that on being asked who he was, the negro stated himself to be the second cook; the Captain replied, that he was not, and that he had never seen him before; that thereupon the cook of the vessel being called upon by the Captain to say who the man was, asserted that he was the second cook; to this the Captain again replied, that he had never seen the man before, and then called upon the negro to pro-

Winston v. Foster and others.

duce his free papers ; that finding that he had none, Captain Foster had the boy secured, and sent him on board of the Tiger, to be taken back to New Orleans. This was done, and the commander of the tow-boat, on his return to the city, lodged the negro in the jail of the Third Municipality. Captain Foster at the same time addressed to the Mayor a note in the following terms, to wit :

" S. W. Pass, May 24, 1840.

" SIR :—I discovered on board of my ship a negro man who calls himself Thomas Taylor, says he is free, and was born in Richmond, Virginia. The said negro having no documents or proof by which his freedom can be authenticated, I have thought proper to place him in charge of Captain Beebe, of the steam-boat Tiger, who will deliver him over to the competent authorities. Respectfully,

" R. W. FOSTER, comm'g ship *St. Mary*.

" To Wm. Freret, Mayor of New Orleans."

The evidence further shows, that the boy, Thomas Taylor, was a confirmed, and incorrigible runaway, and was advertised in the *Picayune*, as having left the plaintiff, his master, on the 23d of May, 1840.

Under these facts, it does not appear to us, that the defendants have incurred the fine imposed by the statute of 1840. This law, being one of great severity, must be construed strictly, and should not be extended to cases not coming clearly, and literally, within its purview. The fine of \$500 is incurred, only when the master and owners of a vessel labor under the presumption created by the first section of the act, and cannot destroy it in the manner therein required. The presumption, which the law implies, from the fact of the master finding his slave on board of a vessel without his written consent, is, that the master and owners of the vessel have received the slave, or have hidden him, or have suffered him to remain on board, with the intention of depriving his master of him, and of transporting him out of the State, or from one part of the State to another. In the present case, no such presumption exists against the defendants, because the Captain himself, and not the owner, found this slave on board of the vessel. The pre-

sumption even if it did exist, would be completely repelled by the conduct of the Captain, who, on discovering this runaway negro on board of his vessel, pursued the very course pointed out to him by law. B. & C.'s Dig. p. 254, No. 65. But it is insisted, that the evidence shows, that the slave was on board the *St. Mary*, with the knowledge and connivance of the cook, and we are referred to the case of *Buel v. The Steamer New York*, reported in 17 La. 541, in which we held, that "the defendant was liable for the value of the slave sued for, even if he was brought aboard by the engineer of the boat, acting under the Captain, contrary to his, the Captain's, instructions, and without his knowledge." This decision would be applicable to the present case, if the slave Thomas Taylor, had been carried away and lost to the plaintiff, and this suit were brought to recover his value. We would then hold, as we did in the case relied on, that the defendants are answerable for the damage occasioned by the acts of those they have employed, and cannot excuse themselves on the plea, that those acts were done contrary to their instructions, and without their knowledge. Civil Code, art. 2299. But the plaintiff's slave has been returned to her; and the only question is, whether the defendants have incurred the fine which the Legislature have imposed from motives of public policy. We think they have not, as there exists against them no evidence or presumption of law, that they did any of the acts intended to be punished by the fine.

It is, therefore, ordered, that the judgment of the District Court be avoided, and reversed, and that ours be for the defendants, with costs in both courts.

Elwyn, for the plaintiff.

Rawle, for the appellants.

PETER JAMES KERNAN v. THOMAS G. CHAMBERLIN.

In an action for slander, malice need not be expressly proved ; it may be implied. Though a defendant may have acted without malice, yet, if his conduct has been marked by great imprudence, and a want of due regard for the rights and feelings of the plaintiff, he will be responsible to the latter, for whatever damage his conduct has caused. C. C. arts. 1928 No. 3, 2294, 2295.

APPEAL from the Parish Court of New Orleans, *Maurian, J. Deslix and Schmidt*, for the plaintiff.

C. M. Jones and A. Hennen, for the appellant.

MORPHY, J. This is an action in damages for slander, false imprisonment, and assault and battery. The petition charges, in substance, that the plaintiff having entered the store of defendant, with a view to buy some German silver spoons, and having made for a lot of said article an offer, which the defendant seemed unwilling to take, he left the store, when Chamberlin followed him into the street, and there publicly charged him, before a great many persons, with being a *thief* and a *robber*, and asserted loudly and repeatedly, that the plaintiff had entered his store with the felonious intent of stealing his spoons, and had actually stolen half a dozen of them ; that after making these false, calumnious, and malicious charges, Chamberlin struck and beat the plaintiff, and caused him to be arrested, dragged through the streets by the city guard, and incarcerated in the public jail, reserved for vagrants and malefactors ; that afterwards, to wit, on the 21st of April, 1840, the defendant did falsely, maliciously, and without the least foundation, make before the Recorder of the First Municipality, an affidavit, charging the plaintiff with larceny, and assault and battery. The petition concludes with a prayer for damages, to the amount of \$10,000, for money expended in procuring his acquittal before the Recorder, for his actual sufferings in jail, and for the injury sustained in his character and good name, &c. The defendant pleaded the general issue, averring, at the same time, that he was justified in saying, or doing any thing he may have said or done on the occasion alluded to in the plaintiff's petition. He further claimed damages in reconvention, to the amount of

Petit v. Laville.

\$10,000, on the averment that the plaintiff had entered his store, and, without cause, violently assaulted and beaten him. The case was tried before a jury. The plaintiff having had a verdict and judgment in his favor for \$1000, the defendant appealed, after an ineffectual attempt to obtain a new trial. / 2

We have attentively perused the whole evidence, which is voluminous. We find it somewhat contradictory, in relation to the assault and battery which the parties charge upon each other. It does not clearly appear who gave the first blow; but the testimony is strong and conclusive as to the calumnious, and entirely unfounded charges, made by the defendant against the plaintiff, who was honorably discharged from the accusation. The evidence shows, that a day or two before his arrest, the plaintiff had retained a passage for Europe, and paid the passage money, which he lost by being detained here; and that, in consequence of the prosecution instituted against him, he was put to much trouble, inconvenience, and expense. Malice need not be expressly proved, it may be implied; but were it even admitted, that the defendant in this case acted without malice, as his counsel urges, he cannot free himself from the imputation of great imprudence, indiscretion, and a want of due regard for the rights and feelings of the plaintiff; and he is bound to repair whatever damage his conduct may have caused to the latter. Civil Code, arts. 2294, 2295, 1928, No. 3. 6 Mart. N. S. 538. 2 La. 79. 3 La. 207. 16 La. 403.

On the score of the quantum of damages, the jury were the legitimate judges; and, under the circumstances of this case, as disclosed by the evidence, we are unable to say that they erred.

Judgment affirmed.

GRENIER PETIT V. JEAN FRANÇOIS LAVILLE.

To recover in an action for the difference between the price for which a slave was sold to the defendant, and that subsequently obtained on a sale made at the purchaser's risk, on his failure to comply with the terms of the first sale, where there is a general denial, plaintiff must prove that defendant was put in mora before the second sale

APPEAL from the Parish Court of New Orleans, *Maurian, J.*

SIMON, J. In January, 1841, the defendant became the purchaser, at public auction, of a negro woman named Aglae, for the sum of thirteen hundred and ten dollars, payable at 6, 12, 18, and 24 months credit, for which notes were to be given; with good and satisfactory endorsers. The slave was sold as *a washer*, and *a cook*, and was recommended as *a good subject*. The defendant did not comply with the conditions of the sale, by furnishing the notes required in the *procès verbal* of adjudication; and sometime in March following, the slave was resold at public auction, by the plaintiff, for the account, and at the risk of the defendant, (*à sa folle enchère*,) and was adjudicated to the highest bidder for the sum of \$1040.

The plaintiff sues to recover the difference of the price, and the amount of the expenses occasioned by the second sale, forming together the sum of \$345. He also claims \$200 damages.

The plaintiff's claim is resisted on the grounds: that the slave was adjudicated to the defendant as a good washer and a good subject, but that she is neither, that this was ascertained a few days after the adjudication; that the slave ran away from the defendant, and was in the habit of running away at the time of the sale; that when the defendant ascertained those facts, he offered to return and did return the slave to the plaintiff, expressing his readiness to annul the adjudication: wherefore, he prays that the adjudication may be annulled.

There was judgment below in favor of the plaintiff for the sum of \$345, and the defendant has appealed.

The petition contains the allegation, that the defendant was legally put in default, and that, in consequence thereof, the slave was resold at his risk. This allegation, as well as all the other facts alleged in the petition, is met by a general denial on the part of the defendant; and thus it became incumbent on the plaintiff to prove that he had put his adversary *in mora*, previous to the sale, otherwise his action could not be maintained. For that purpose, a letter addressed to the defendant by the plaintiff, is found in the record; which letter, dated the 20th of February, 1841, calls upon the defendant to comply with the conditions of the sale, and says: "*dès à présent l'esclave est et demenre à vos*

 Hoey v. Pepper.

risques et périls." This would have been sufficient to put the defendant in default, if it had been shown that the letter was delivered to him, or left at his domicil. 3 La. 99. But the record contains no evidence that the letter ever reached the defendant's hands, and we cannot presume it. It is clear, that it was the duty of the plaintiff to put the defendant in *mora*, previous to proceeding to the sale of the slave at the defendant's *folle enchère*, and that he cannot recover the difference of the price, unless he show that this prerequisite has been duly complied with. This not having been shown in this case, the plaintiff's action must fail.

It is therefore ordered and decreed, that the judgment of the Parish Court be annulled, and reversed, and that ours be for the defendant, as in case of nonsuit, with costs in both courts.*

Forcelle and Blache, for the plaintiff.

J. F. Pepin, for the appellant.

 NICHOLAS HOEY v. GEORGE PEPPER.

Where in an action commenced by attachment against an absentee, the Sheriff's return on the attachment merely shows, that he attached all the property belonging to the defendant in the hands of the garnishee, and no interrogatories are propounded to, nor other proceedings had against the latter, but the suit is carried on contradictorily, with an attorney appointed by the court to represent the defendant, he will not be considered as in court, and the suit will be dismissed.

APPEAL from the District Court of the First District, *Buchanan, J.*

* *Forcelle and Blache*, for a re-hearing. The allegation in the answer, that "the defendant offered to return, and did actually return the slave to the plaintiff, expressing his readiness to annul the adjudication," proving the unwillingness or refusal of the defendant to comply with the terms of the first sale, rendered proof of any demand to comply with such terms, unnecessary. *Lex neminem cogit ad vana. Lynch v. Postlethwaite*, 7 Mart. 69. *Kelly v. Caldwell*, 4 La. 40. *Garcia et al. v. Champomier et al.*, 8 La. 522. *Hyde v. Grigsby*, 11 La. 240.

Re-hearing refused.

The United States and others v. Cochrane and others.

Roselius, for the plaintiff.

Potts, for the appellant.

MARTIN, J. This is a suit by attachment, in which the defendant is appellant. His counsel contends, that the court proceeded erroneously to judgment, as no property of his was attached. The Sheriff's return shows only, that he attached the goods and chattels, lands and tenements, moneys, effects, or property of any kind of the defendant in the hands of D. J. Rogers, who was made a garnishee. It does not appear, that this man came into court, that interrogatories were filed, or that any other proceedings were had against him. The defendant, consequently, was not in court, and proceedings were incorrectly carried on, contradictorily with an attorney appointed by the Judge.

It is therefore ordered, and decreed, that the judgment be annulled, and reversed, and that the plaintiff's suit be dismissed, with costs in both courts.

THE UNITED STATES OF AMERICA and others v. A. F. COCHRANE and others.

Defendants had each obtained, separately, judgment for \$100, with interest and costs, against the Bank of the United States, and had levied separate executions on different lots of ground. Plaintiffs having taken a rule on them, to show cause why they should not be restrained from all further proceedings for the reasons stated, the rule was made absolute, and defendants appealed. *Held*, that no appeal will lie, each judgment being for less than three hundred dollars.

APPEAL from a judgment of the Commercial Court of New Orleans, *Watts*, J.

T. Slidell, *Peyton* and *J. W. Smith*, for the plaintiffs.

Durell, for the appellants.

GARLAND, J. Each of the defendants had obtained a separate judgment in the City Court of Lafayette, for \$100, with interest and costs, upon which separate executions were issued, and severally levied on different lots of ground in the city of Lafayette,

which were advertised for sale by the Marshal of that court. The United States, represented by their attorney, and, Adams & Frazier, receivers of the assets and funds of the Bank of the United States, and its assignees, called on the defendants, by a rule, to show cause why they should not desist, and be restrained from all further proceedings under those seizures, on the ground, that the proceedings were an illegal interference with the proceedings of the Commercial Court, said property having been previously attached under process issued out of that court, in the suit of *The United States v. The Bank of the United States*, and subjected to their previous lien, and to the orders of the court, The defendants appeared and filed various objections to the proceedings, which were overruled by the court. A stay of all proceedings was ordered, and the defendants have appealed.

We have not thought it necessary to state the case more fully, as it is clear, that we have no jurisdiction of it. This court, on more than one occasion, have decided, that an appeal will not lie from a judgment rendered on *one* petition, enjoining executions on several judgments, each for less than three hundred dollars, rendered in separate suits, although the judgments added together amount to more than three hundred dollars. 5 Mart. N. S. 87. The counsel for the appellants endeavors to avoid the effect of this well established doctrine, by saying the property seized amounts to more than three hundred dollars. Of this we have no evidence. It is, therefore, unnecessary to consider what effect the alleged fact might have.

Appeal dismissed.

RICHARD H. DICKINSON v. JOHN GOODIN and another.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Eustis*, for the plaintiff.

R. N. Ogden, and *A. N. Ogden*, for the appellants.

MARTIN, J. The defendants are appellants from a judgment against them, as acceptor and drawer of a bill of exchange. They pleaded the general issue. Freeman, the drawer, added, that he had been employed by the plaintiff, Dabney, and Templeman to sell several slaves as their agent ; that he sold one of them, Bartlett, to Hopkins, who insisted on Freeman giving a title in his, Freeman's, name ; that by the directions of the owners of the slave, the price of Bartlett was to be paid to the plaintiff, and that accordingly he, Freeman, gave him a note which he had received from Hopkins, which the plaintiff took as collateral security ; and that the bill now sued upon was afterwards given to him on his assurance that the payment of the note he had received as collateral security, should discharge the bill ; that, in the expectation that Hopkins would pay the note, the plaintiff returned it to him, Freeman : that Bartlett having died of a redhibitory disease, existing at the time of the sale, Hopkins refused to pay the note ; and, that he, Freeman, is thereby discharged from any obligation as drawer of the bill, to the plaintiff.

The conscience of the plaintiff was probed by interrogatories, and he absolutely denied his having had any interest, or property, in the slave Bartlett, and his having been sold by his directions. The denial was not disproved, so that the defence of Freeman is totally unsupported. The plaintiff made out the rest of his case.

Judgment affirmed.

CHARLES E. D'INVILLIERS v. THE SECOND MUNICIPALITY OF
NEW ORLEANS.

An exception to the sufficiency of the description in the petition of the notes sued on, will be overruled, where the notes themselves are annexed to the petition for reference.

It is unnecessary, in an action on notes issued by a municipal corporation in this State, and circulated as a currency, to prove the authority of the municipal officers by whom they were signed. The circulation of such notes by the corporation is a historical fact, of which the court will take notice without proof.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*

The petitioner in this case alleged, that the defendants are indebted to him in the sum of \$500, with interest, for this, that the petitioner is the holder and owner of certain promissory notes, for various sums, payable on demand, drawn and endorsed by the duly authorized officers of the Municipality No. Two of the city of New Orleans, to wit: S. H. Turner, Jr., and Thomas Sloo, Jr., as Treasurer, and John Calhoun, as Comptroller, all said notes being dated at New Orleans at sundry times, and annexed to this petition for reference," &c.

Hornor, for the plaintiff.

Rawle, for the appellants.

MARTIN, J. The defendants sued on a number of municipality notes, pleaded as an exception, that they were not described in the petition. The exception was overruled; judgment was taken by default, for want of an answer; and afterwards confirmed; whereupon the defendants appealed. The exception was properly overruled, the notes being annexed to the petition for reference. In making the judgment final, one witness only was introduced. He deposed, that he presented the notes to the defendants' Treasurer, and demanded payment, and was answered that they were genuine, but that he could not pay them. He proved the signatures of the Treasurer and Comptroller on the notes. It has been urged, that the court erred, there being no evidence of the authority of the Treasurer and Comptroller to sign the notes. It is a historical fact of which the court cannot fail to take notice, that

Price and others v. Smith and another.

such notes as those sued upon, have been put afloat by the Municipality.

Judgment affirmed.

THOMAS K. PRICE and others v. WILLIAM SMITH and another.

APPEAL by the intervenor, from a judgment of the Commercial Court of New Orleans, *Watts, J.*

Wharton, for the plaintiffs.

L. Peirce, for the appellant.

BULLARD, J. The only question which this case presents is one of fact, to wit, whether thirty-one bales of cotton, attached as the property of Hightower, one of the defendants, at the suit of the plaintiffs, belonged to him, or to the intervenor R. M. Farley, in whose name they were shipped.

The cotton was raised on the plantation of Hightower, and consequently was originally his property. The evidence does not show, that there was a sale to Farley, for a price either fixed, or to be fixed, so as to put the cotton at his risk. On the contrary, it would seem the parties still considered it at the risk of Hightower, and subject to his control. It was consequently liable to be attached by his creditors.

Judgment affirmed.

CHARLES CAFFIN v. A. POLLARD.

Bills of exception should be signed by the Judge, before signing the judgment.

All agreements between parties or counsel, derogating from the rules of practice fixed by law, must be entered on the minutes of the court, or reduced to writing and filed in the record, or they will not be noticed.

RULE on *Maurian*, Judge of the Parish Court of New Orleans,

the Marshal of the City Court of New Orleans, and the plaintiff, Caffin.

Greiner, for the intervenors, plaintiffs in the rule.

Labarre, contra.

GARLAND, J. The counsel for Norman, Steel & Co., and others, intervenors, obtained a rule on the Judge of the Parish Court of New Orleans, the Marshal of the City Court, and Caffin, to show cause, why further proceedings in the above named case should not be suspended, and why the certificate of the Clerk of this court, that the record and appeal of the intervenors had not been filed on the return day, should not be returned, and the City Marshal prohibited from paying over certain money in his hands, and the Judge of the Parish Court enjoined from issuing execution in the above case.

It appears, that in the inferior court, an application for an appeal was presented in due time, and the return day fixed. Some delay occurred in making out the record, in consequence of a difficulty arising, as to the signing of several bills of exception, which had been reserved during the trial, but not formally made out, and signed previous to the judgment. They were for a time lost or mislaid, in consequence of which the record was not ready on the return day of the appeal. The counsel for the appellants, then applied to this court for further time to bring up the record, which was granted; but in consequence of a verbal understanding to that effect between the counsel, it was not entered on the records of the court.

The counsel for Caffin having waited some time, and the record not being filed, took out a certificate to that effect, and was proceeding with his execution in the inferior court, when this rule was taken. The counsel now differ as to the exact meaning, and extent of the agreement they entered into, and affidavits are filed by both, stating their different views of it.

It cannot be expected, that we shall decide upon such a case. It is one, that shows the inconvenience, and impropriety of not adhering to the rules of practice established by law. The Judge ought to have signed the bills of exception before he did the judgment; and all agreements between parties or counsel, which derogate from the rules of practice as fixed by law, should be made

Hanson and others v. The City Counsel of Lafayette.

in writing. We are determined not to notice, or carry into effect verbal agreements, between counsel in relation to cases before us. All arrangements between members of the bar, must be entered on the minutes of the court, or reduced to writing, and filed in the record.

Rule discharged.

PETER HANSON and others v. THE CITY COUNCIL OF LAFAYETTE.

APPEAL from the District Court of the First District, *Buchanan, J.*

GARLAND, J. This case was before us in May, 1841, and a decision was given upon all the points in controversy, except as to the question of damages. 18 La. 295, 309. Upon that question a re-hearing was accorded; and, as the court cannot do full justice without all the evidence which the plaintiffs say exists, we shall remand the cause to be tried upon that question alone.

The case is, therefore, remanded to the District Court, for the purpose of trying the question, whether the plaintiffs are entitled to damages against the defendants, and if so, to what amount. The costs to abide the final decision of the case.

Latour, Roselius, and L. Peirce, for the plaintiffs.

Eustis, for the appellants.

FRANÇOIS JARTROUX v. MICHEL DEBERGUE and others.

By the passage of the act of 28th March, 1840, chap. 117, abolishing imprisonment for debt, bail not previously fixed with the debt, were discharged.

APPEAL from the Parish Court of New Orleans, *Maurian, J.*
Fourchy, for the appellant.

Schmidt, for the defendants.

Denton v. Murdock.

BULLARD, J. This is an appeal from an interlocutory judgment of the Parish Court, setting aside an order of arrest. The case has been pending in this court for six years; and in the meantime, the repeal of the law authorizing the issuing of the writ of *capias ad satisfaciendum*, has left the plaintiff without recourse upon the bail, even if we should reverse the judgment complained of, and reinstate the order of arrest.

Appeal dismissed.

GABRIEL W. DENTON v. ANDREW MURDOCK.

The party interested in establishing that a rule of an inferior court has been violated, must show its existence by the record.

Where a party has filed cross-interrogatories, without having required his adversary to state the names or residence of the witnesses whom he proposed to examine under a commission, or what he expected to prove by them, it will be too late at the time of the trial, to object to the admission of the testimony for the want of such statement.

The decision in *Evans et al. v. Gray et al.*, (12 Mart. 475,) requiring the affidavit to obtain a commission to take testimony, to state the names of the witnesses to be examined, was made when no rule of court existed on the subject, and was before the promulgation of the Code of Practice, which made a change in the law on this subject, by declaring, art. 424, that such testimony "shall be taken pursuant to the rules of the respective courts."

Where a cause has been tried by a jury, and no motion was made for a new trial, it must be an extreme case to induce the remanding of it.

APPEAL from the Parish Court of New Orleans, *Maurian, J.*

GARLAND, J. This suit is instituted to recover the price of a slave named John, sold to the plaintiff by the defendant, on the 30th of December, 1836, together with charges for loss of service, physician's bills, expenses, and damages on account of the slave being afflicted with a redhibitory disease. The answer is a general denial. The cause, it is said in the judgment of the court, was tried by a jury, and the verdict is recited, but the record does not inform us who composed it. Verdict and judgment were given for the plaintiff for \$1200, the value of the slave, and

\$242 50 for expenses incurred, from which the defendant has, without asking for a new trial, appealed.

The counsel for the defendant has called our attention to a bill of exceptions, taken by him on the trial. The plaintiff offered, as evidence, certain depositions taken in Mississippi, to the introduction of which, the counsel for the defendant objected on the ground, "that the names of the witnesses, whose testimony was offered, were not stated in the affidavit upon which the commission issued;" and that Dawson, one of the witnesses, is interested in the case, as is shown by his confession, in answer to the interrogatories. To sustain the first objection, the counsel has referred us to a decision, (*Evans et al. v. Gray et al.*, 12 Martin, 475,) which would, previous to the adoption of the Code of Practice, have sustained his objection; but we think that code has made alteration, as to the mode of obtaining commissions to take testimony. Art. 424 provides, that "when either the plaintiff or defendant has witnesses, whom he wishes to be heard in support of his claims, he must cause the testimony of such witnesses to be taken in writing, to be read in evidence on the trial of the cause, *pursuant to the rules of the respective courts.*" Art. 425 declares, that if the witness reside out of the parish in which the suit is pending, the plaintiff or defendant shall be entitled to obtain from the court a commission to take his deposition. It will be seen, that the code has left very much to the discretion of the Judges of the respective courts, the mode of issuing commissions to take depositions. What rules have been made in the Parish Court, the record does not inform us; but if any rule has been violated, it is the duty of the appellant to show it, and to have annexed the rule to his exception. It does not appear, that when the commission was issued, the defendant made any specific objection. Had he done so, we have no doubt of his right to have the names and places of residence of the witnesses stated, and what was expected to be proved by them; but having filed cross-interrogatories, without making any such requisition, it seems to us too late to raise the objection on the trial. The omission of the names of the witnesses, might have been a good ground to decline filing cross-interrogatories; but the defendant does not seem to have sustained any injury from the omission, or to have

made a timely objection; we, therefore, think, the Judge did not err in overruling the objection. In the case cited by the counsel for the defendant, it is admitted, that there was no rule of court upon the subject, and this court decided upon the general principles in relation to the continuance of causes. If the defendant, in this case, had shown that there was no rule of court, it is possible we should have adhered to the doctrine stated in the case relied on.

We think the Judge did not err in overruling the objection made to the deposition of Dawson. He swears, that he has no interest, direct or indirect, in the case; and the counsel has not, in his bill of exceptions, stated any particular in which he is so, but refers generally to his testimony to establish it. This is very indefinite, and too general an objection to the deposition.

Upon the merits of the case, we do not entirely concur with the jury; but as the defendant did not ask for a new trial in the inferior court, we shall not remand it; contenting ourselves with the correction of one error so apparent, that we cannot pass it over. The jury have allowed the plaintiff \$242 50, the "amount of the bill of expenses." There is no evidence, that he overpaid any thing, or is liable to pay any thing, or that the expenses are reasonable or necessary. No witness testifies in relation to the expenses, except Dawson, whose evidence, although admissible, is to be received with many grains of allowance, in consequence of his connection with the whole transaction, and the position he occupies. He annexes to his deposition, a bill in his own name against the plaintiff, which the latter has neither paid, nor admitted to be correct, but which Dawson says, that he has paid or assumed to pay. There is no evidence, that the plaintiff ever authorized the payment, or assumption of these charges; nor is the correctness of them established by the production of any receipt or voucher. One charge is a sum of \$150, alleged to have been paid to the physician who attended the slave. The physician was examined as a witness, and nothing was asked of him as to the correctness of the charge, or whether it had been settled. There are charges for sums paid to other persons, but they are not called on to testify to their correctness; nor is the plaintiff shown to be liable for them. In the case of *Riggs v. Duperrier et al.*, 19

Hairy v. Dennistoun and another.

La. 418, we remanded the case, as the plaintiff had failed to prove the amount of damages; and we would, probably, do the same now, if either party had required it; but it must be an extreme case, that will induce us to remand a cause after being tried by a jury, where no motion has been made for a new trial. 19 La. 475. 9 Mart. 286. 15 La. 467.

It is, therefore, ordered and decreed, that the judgment of the Parish Court, so far as it condemns the defendant to pay the sum of twelve hundred dollars, the value of the slave John, be affirmed; but that so far as it relates to the sum of two hundred and forty-two dollars and fifty cents, claimed for expenses, it be annulled and reversed, and the demand dismissed, without prejudice; the defendant paying the costs in the court below, those of the appeal to be paid by the plaintiff.

Josephs, for the plaintiff.

Wharton, for the appellant.

PATRICK HAIRY v. A. DENNISTOUN and another.

APPEAL from the District Court of the First District, *Buchanan*, J.

Larue and *Preston*, for the plaintiff.

Briggs, for the appellants.

MORPHY, J. The petitioner claims \$384, for the freight of 182 barrels of molasses, and four hogsheads of sugar, transported from Houmas, in Lafourche Interior, to Donaldsonville. He alleges, that the said articles of merchandize were there delivered by him to the agent of the defendants, on the 29th of October, 1839, according to a freight bill annexed to his petition; that they have not passed into third hands, and that he has a privilege or lien upon the same. The defendants deny that they are in any wise indebted to the plaintiff, and aver that the molasses and sugar, provisionally seized, were consigned to them, by Messrs Pujos & Verret, of Donaldsonville, for account of J. J. Banks, on board the steamer *Pekin*, to be sold by them as commission merchants.

Hairy v. Dennistoun and another.

They allege, that they have not now, nor ever had any property in the sugar or molasses, and do not know the petitioner. There was a judgment below in favor of the latter for the amount claimed, with the privilege of a carrier on the property seized. The defendants have appealed.

The evidence makes out a case different from that set forth in the petition, but this should be no bar to the plaintiff's right to recover, if it be established by such evidence. It appears, that the sugar and molasses belonged, not to the defendants, but to one J. J. Banks, from whose plantation in Lafourche Interior, it was carried by the plaintiff to Donaldsonville. At the request of Pujos & Verret, not the agents of the defendants, as alleged, but probably, the correspondents and commission merchants of Banks at that place, the goods were put on board of the steamer Pekin, and sent to the defendants at New Orleans to be sold for the account of the said Banks. The plaintiff followed the property subject to his lien for the freight, and, on the 31st of October, 1839, brought suit, and obtained an order of provisional seizure. The defendants bonded the property, and disposed of it. The witnesses who prove the services rendered, and the reasonableness of the charge made by the plaintiff, do not state on what day of October the goods were delivered by plaintiff; but we are satisfied from the circumstances of the case, that it must have been in the latter part of that month, and that therefore, the fifteen days within which his lien could be enforced, under article 3213 of the Civil Code, had not yet expired when the seizure took place. No attempt was made below, to set aside the order of provisional seizure on the ground that the privilege no longer existed. The defendants having received goods, subject to such privilege, as the ultimate consignees, and agents of Banks, and having bonded the property, the court below did not err in allowing the plaintiff a judgment to be satisfied out of its proceeds. Civil Code, art. 3213. 6 Mart. 12.

Judgment affirmed.

PAUL LAGAY V. LAZARUS CHIEUSSE.

The character of an action depends upon the prayer for judgment.

APPEAL from the District Court of the First District, *Buchanan, J.* The petition filed in this case, on the 8th of May, 1837, alleges: That the defendant is justly indebted to the petitioner, in the sum of \$1277 28, for merchandize sold and delivered, which, though long since due and demanded, the defendant refuses to pay; that \$1202 28 of that sum, is due for goods delivered to defendant, to be sold by him "for account of the petitioner," the profits to be divided between them, but that defendant "took said goods on his own responsibility, at all hazards," and that he has always refused to account for the same, though requested; and that the balance of the sum of \$1277 28, to wit, \$75, is due for goods sold to the defendant, for his own personal use and benefit. The petition concludes by praying, "that judgment may be rendered in favor of the petitioner, against the defendant, for the amount of his claim, to wit, \$1277 28, with interest and costs, and for all relief adapted to the case." Certain property of the defendant was attached, and he was arrested and held to bail.

The defendant answers, the 13th of May, 1837: That, reserving his right to all exceptions to the errors and contradictions in the petition, he denied all the facts and allegations in it, except those subsequently expressly admitted; that, being about to depart for Tampico, the plaintiff requested him to take charge, as his consignee and agent, of certain goods and merchandize, to be landed at Tampico, and there sold for his account; that the goods, according to the invoice made by the plaintiff, and annexed for reference, were valued at \$1202 28; and that they were to remain, until sold, at the risk of the plaintiff: that they were landed at Tampico, where every exertion was used by the respondent to dispose of them to the best advantage for the plaintiff, who succeeded in disposing of only a small portion of them, they being unfit for the Mexican market: that he informed plaintiff thereof, who, by letter, ordered respondent to deliver over the unsold goods to one Eidmann, a merchant at Tampico, which he did, and inform-

ed the petitioner thereof : that he disbursed for plaintiff, on account of the goods, for freight and insurance to Tampico, \$236 06 : that the portion of goods sold for plaintiff's account, added to the \$75 acknowledged to be due for articles purchased by respondent for himself, amount to \$203 96, leaving a balance of \$32 10 : that this suit was instituted through malice, with a view to vex and harrass him, and to extort a large sum of money : that by attaching respondent's property, and arresting and holding him to bail, without cause, plaintiff has caused him damage to the amount of \$2000, which he claims in reconvention. The answer concludes with a prayer, that plaintiff's demand may be dismissed with costs ; that the respondent may recover, in reconvention, the balance of \$32 10, and \$2000 for damages, as claimed ; and for all other just and equitable relief, which the case may require.

The plaintiff answered the demand, in reconvention, by a general denial.

On the 17th of March, 1840, the counsel of the defendant, filed a paper in the following words : "The peremptory exception of the defendant founded in law, respectfully shows, that from the allegations of the plaintiff's petition itself, it results, that defendant and plaintiff were in partnership in the particular transaction related in the petition : that, as a partner, the defendant cannot be sued but for a settlement of the accounts of that transaction ; wherefore he prays, that plaintiff's petition may be dismissed, with costs, as in case of nonsuit ; and for general relief."

A bill of exceptions, taken by the plaintiff, recites : "That on the trial of this case, the counsel for the defendant alleging, that plaintiff's petition contained two inconsistent demands, called upon him to make his election between them, and to determine which he meant to rely on, which motion the court sustained, and ordered the plaintiff to make his election, though he insisted that there were no inconsistent demands in said petition, and that the exception came too late : that the election was accordingly made, solely because plaintiff was ordered so to do by the court, and that he does not intend thereby to abandon his right to have the cause tried upon the issues made," &c.

From an entry on the minutes of the court, it appears, "that

the plaintiff selected between the two causes of action set forth in his petition, the second ground, which charges, that the goods mentioned in the bill were delivered to defendant, to be by him sold and accounted for." Plaintiff then offered in evidence, the following receipt, with testimony to establish that it was written and signed by the defendant :

"Nelle Orleans, le 4 Juin, 1833.

"Je reconnais avoir reçu de Mr. Paul Lagay, de la Nelle Orleans, douze cent deux piastres 28-100 c. en marchandises, pour être vendus au mieux de les interets et partager les benefices avec lui, lesquelles marchandises je prends sur ma responsabilité quoiqu'il en arrive.

"1202 28-100.

"L. CHIEUSSE."

After this election had been made, and the plaintiff had closed his evidence, the defendant filed a second paper, in the following words : "Defendant now pleads his peremptory exception, by averring, that on the face of the petition, your respondent, (after the choice of plaintiff,) is sued for goods, the profits of which were to be divided between the parties ; that the contract, as averred, created a partnership between plaintiff and defendant ; and that the respondent cannot be sued for any special sum arising under said partnership, before being sued to render an account : wherefore he prays, that said petition be dismissed, with costs." To the filing of this paper, the plaintiff also excepted, "on the ground that it was not a peremptory, but a dilatory, or declinatory exception, and, as such, could not be filed at that stage of the trial ;" but the court overruled his objections, and admitted the plea.

There was a judgment of nonsuit, both on the principal and conventional demand. The plaintiff appealed.

Schmidt, for the appellant. The court below erred in compelling the plaintiff to elect between the two demands, supposed to be contained in his petition, and in receiving and sustaining what the defendant terms his peremptory exception. The evidence shows, that Lagay is entitled to judgment for the whole of his demand.

Bodin, for the defendant. The court did not err. See the

cases of *Mend v. Curry*, 8 Mart. N. S. 280, and *De L'Homme v. De Kerlegand*, 4 La. 353.

BULLARD, J.* This action was commenced by an attachment, on an affidavit of the plaintiff, that the defendant, who resided in Mobile, was indebted to him in the sum of \$1277 28, for merchandize sold and delivered. On the following day, the petition was filed, which set forth, that the plaintiff, between the 17th of May and the 6th of June, 1833, sold and delivered to the defendants, merchandize to that amount; that \$1202 28 of the amount was delivered to the defendant, to be sold by him for account of the petitioner, and the profits to be equally divided; but that he took the goods on his own responsibility, at all hazards, and has always refused to account for the same, though demanded; and that the balance of the account was for goods sold to the defendant for his personal use. The petition concludes with a prayer for judgment for the amount of his claim, \$1277 28, with interest and costs.

The answer avers, that the defendant, being about to depart for Tampico, was requested by the plaintiff to take charge, as consignee and agent, of a lot of goods, to be landed at that place, and sold for account of the plaintiff; that the goods, until sold, were to remain at the risk of the plaintiff; that they were accordingly landed, but only a part sold, being unfit for the Mexican market; that according to the plaintiff's order, he delivered over to one Eidmann, all the goods remaining unsold. The defendant next sets forth disbursements made by him, and pleads in reconvention; but no other part of the answer need now be noticed.

It is to be remarked, that this answer contains no exception to the form of the action; but afterwards, the defendant's counsel filed what he calls a peremptory exception, to wit, that on the face of the petition, (after the choice of the plaintiff,) he is sued for goods, the profits of which were to be divided between the parties; that the contract, as averred, created a partnership; and that he cannot be sued for any special sum, arising under said partnership, before being sued to render an account.

* MORPHY, J., having been of counsel in this case, did not sit on its trial.

Sill v. Barris and another.

The following is a literal translation of the defendant's receipt, upon which this action is founded: "I acknowledge to have received of Mr. Paul Lagay, of New Orleans, \$1202 28, in merchandize, to be sold to the best of his interest, and to participate in the profits with him; *which merchandize, I take upon my responsibility, whatever may happen.*"

The petition sets forth the contract, such as it was, and asks for judgment; not for profits, but only for the capital. There is no prayer for a judgment in the alternative. The character of the action, we have often said, depends upon the prayer for judgment. It is clear, that according to the conclusion of the petition, the plaintiff could not, in this action, have had judgment for a rendition of accounts, and a share of profits. He confined his demand to a recovery of the capital advanced by him, which the defendant undertook to guaranty. The court, therefore, in our opinion, erred in compelling the plaintiff to elect between two remedies, and then dismissing the suit because he chose the one not originally demanded. The bill of exceptions to this proceeding, upon which the plaintiff and appellant relies, was, we think, well taken.

It is, therefore, ordered and adjudged, that the judgment of the District Court be reversed; that the exception of the defendant be overruled; and the case be remanded for further proceedings, according to law; and that the defendant pay the costs of this appeal.

JOSEPH SILL v. A. BARRIS and another.

APPEAL, by the defendants, from a judgment of the Commercial Court of New Orleans, *Watts, J.*

MORPHY, J. The petitioner claims thirty-one casks of Egyptian cotton seed, in the possession of the defendants, and \$300 damages, for the illegal and wrongful detention of his property. Tarbe disclaims having had any thing to do with the property, being, as he alleges, only employed in the store of his co-defendant Barris,

while the latter avers that the cotton seed in his store, was deposited with him on storage by one McRennell, to whom alone he can deliver the same, as he received it from him; that he is ready and has offered to deliver up the property to McRennell, or to his order, but that plaintiff has never produced such order; that McRennell, is indebted to him in the sum of \$200 for goods purchased, and for storage, which goods he (Barris,) let him have on account of the seed, which was on storage, &c. There was a judgment below in favor of the plaintiff for the property claimed, and for \$100 as damages.

It appears from the evidence, that the plaintiff having received from abroad, thirty-seven casks of Egyptian cotton seed, requested McRennell to store and sell it for him, that McRennell, who was in the employ of Tarbe, writing for him as a temporary clerk, applied to the latter for permission to put the cotton seed in the store, which Tarbe, after consulting Barris, agreed to let him do, and that plaintiff gave Tarbe and McRennell his instructions as to the manner of selling the goods. It further appears, that Tarbe was connected with Barris as a partner; that both their names were at the door, although on different signs; and that Tarbe conducted the whole business of the store. We concur in opinion with the inferior Judge, that the whole defence is one trumped up with a view to hold the property, which the defendants well knew belonged to the plaintiff, for the payment of the debt they allege to be due to them by McRennell; but there is not the slightest evidence of any damage having been suffered by the plaintiff, whose property had been in the store of the defendants only a few weeks, when it was sequestered.

It is therefore ordered, that the judgment of the Commercial Court be affirmed, except that part of it which decrees the defendants to pay damages, which is hereby reversed; the plaintiff and appellee to pay the cost of this appeal.

L. C. Duncan, for the plaintiff.

F. B. Conrad, for the appellants.

WILLIAM H. KELLY v. D. S. BENEDICT and another, Owners
of the Steamer General Brown.

To recover of the owners of a steamer, as common carriers, the value of property lost or destroyed by them, it is sufficient to allege that the defendants undertook as carriers to convey the property for hire, and failed to do so. Any specification of the acts, or neglect which occasioned the loss, may be regarded as surplusage, and can furnish no ground for excepting to the petition as uniting distinct causes of action—a cause *ex contractu*, with one *ex delicto*.

Where it appears from the return of the Commissioner, that a witness whose deposition was taken by him, was cross-examined by a member of the bar, not the counsel of record of the party, it will be presumed that he had authority to appear, either from the client, or his counsel of record, unless his authority be denied on oath.

The return of "not found" on a subpoena for a witness, and proof that he resides out of the State, will authorize the admission of his testimony taken under a commission.

The owners of a steamer employed in carrying freight and passengers for hire, are responsible as partners and common carriers, *in solido*, for any loss of property confided to them, occasioned by want of care or skill in those in charge of the boat.

APPEAL from the Parish Court of New Orleans, *Maurian, J.*
Lockett and Micou, for the plaintiff.

Chinn and Grymes, for the appellants.

BULLARD, J. The plaintiff represents, that he put on board the steamboat General Brown, belonging to the defendants, and then descending the Mississippi, about thirty horses, to be transported to, and delivered in New Orleans. That after the horses were taken on board, and when the boat was at or about the town of Helena, through the negligence and misconduct of the captain, officers, and crew, her boilers exploded, whereby twelve of his horses were killed, and others badly injured, and a quantity of provender was destroyed. He further represents, that after the boat stopped at Helena, the safety valve was not opened so as to let off steam, and none was suffered to escape while lying at said place, and that the explosion was occasioned by such neglect, in the attempt to put off from the landing. He further avers, that the officers of the boat were running in contravention of the act of Congress of the 7th of July, 1838. He alleges the horses de-

stroyed to be worth \$3600. He prays for judgment against the owners as common carriers, and bound, *in solido*, as partners.

The case was submitted to a jury, whose verdict was in favor of the plaintiff for \$2500, and against the defendants, *in solido*. The plaintiff entered a *remittitur* for \$500; and judgment being rendered for the balance against the defendants, *in solido*, they have appealed.

Before the trial it appears, that the defendants offered to file an exception to the petition, for that the plaintiff had made out in his petition a cause of action, *ex contractu*, and in the same petition had set forth a cause of action, *ex delicto*; thus attempting, in the same suit, to unite separate and distinct causes of action.

The court did not err in rejecting this exception. The petition sets forth, in our opinion, only a cause of action growing out of the contract to convey a number of horses, for hire as common carriers, setting forth in general terms, that a part of them was lost by the fault of the captain and officers of the boat, and then setting forth specifically, in what their negligence and default consisted. But it is upon the contract that the plaintiff grounds his right to recover. That part of the petition which specifies the acts of negligence which occasioned the loss, may be regarded as surplusage. It would have sufficed to allege, that the defendants undertook as carriers, to convey the horses for hire, and had failed to do so, leaving to the defendants to prove that they were prevented from complying with their contract by *vis major*.

It is contended that neither of the defendants was on board, and could not, therefore, have prevented the accident, and consequently are not liable, according to article 2299 of the Civil Code. In support of this ground, we are referred to the case of *Palfrey v. Kerr et al.*, 8 Mart. N. S. 504.

The article above cited comes under the head of offences and quasi-offences in the code, and only makes the employer liable for the torts of servants and overseers, when they could have prevented the act which caused the damage, and failed to do so. But, in the present case, the contract was made with the captain, acting within the scope of his authority, and it was violated by a failure through his negligence, to deliver the horses. We have already said, that this does not appear to us to be an action for a

quasi-offence. *Barataria and Lafourche Canal Co. v. Field et al.*, 17 La. 421.

It is next urged, that the court erred in not rejecting a deposition of Hoaglan which was objected to on the ground, that it was taken without notice, without interrogatories served upon the defendants, and that the certificate of the Commissioner, that Mr. Josephs appeared for the counsel of record, was extrajudicial; and because it did not appear, that the witness was not within the jurisdiction of the court, at the time of the trial.

The court did not err. It is apparent on the face of the deposition, that the witness was cross-examined, and we are to presume that Mr. Josephs had authority to appear, either from the client, or the counsel of record, unless that authority be denied on oath. Before the deposition was read to the jury, a witness swore that Hoaglan was not a resident of the city or State, and a subpoena was produced with a return of "not found."

Upon the merits, we are of opinion that the evidence authorized the jury to conclude, that the loss was occasioned by the want of care and skill in those who had charge of the steamboat. She remained at the landing from five to fifteen minutes; and the weight of evidence is, that during that time, there was no escape of steam, and that the fires were kept up. Independently of the act of Congress of 1838, there is enough to satisfy us that the officers of the steamboat were in fault, and that the explosion can be accounted for on no other hypothesis.

The amount of indemnity to which the plaintiff is entitled, is more doubtful. The jury found \$2500, the plaintiff remitted \$500, and the court below was satisfied with that, as a just measure of indemnity; and we cannot say it is so unsupported by evidence, as to authorize us to interfere.

Judgment affirmed.

PIERRE ALEXANDRE GUILLOTTE v. WILLIAM E. THOMPSON.

Damages cannot be assessed without the intervention of a jury. Art. 313, of the Code of Practice, which requires, when damages are to be assessed in confirming a judgment by default, that a jury shall be summoned to find them, as if the defendant had answered, and that the judgment shall be in conformity with their verdict, is not repealed by the 17th section of the act of 10 February, 1841, chap. 16, which provides, that the prayer for a trial by jury in any case before the District, Parish, or Commercial Courts of New Orleans, shall be disregarded, and the case tried by a jury, unless the party shall have advanced the compensation allowed to the jurors, in those courts, on filing his petition or answer praying for such trial.

APPEAL from the District Court of the First District, *Buchanan, J.*

MORPHY, J. The defendant has appealed from a judgment by default, made final in a possessory action, wherein the petitioner claimed damages for the disturbance. He assigns as error apparent on the face of the record, that the damages demanded were assessed by the court without the intervention of a jury. In treating of the confirmation of judgments rendered by default, the Code of Practice provides, art. 313, that, "when from the nature of the demand, *damages are to be assessed*, the court will direct a jury to be summoned to find the same, in the same manner as if the defendant had answered, and the court will give their judgment in conformity with the verdict of the jury." It has occurred to us, that perhaps this article of the code was repealed by the 17th section of the act approved on the 10th of February, 1841, which provides, that the prayer for a jury shall be disregarded, and the case tried by the court, whenever the party making such prayer shall fail to advance, on filing his petition, or answer, the compensation therein allowed to jurors, and to be charged among the costs, (acts of 1841, p. 17*); but, the two laws are not so in-

* This act provides :

Section 17. That the jurors serving in the District, Parish, and Commercial Courts sitting in the city of New Orleans, shall be entitled to a compensation of one dollar each, for every case in which they find a verdict, to be charged among the costs, but to

Richard v. Kimball and another.

consistent as to make it our duty to consider the one as repealed by the other. We understand the article of the code to mean, that a jury is to be summoned by the court, whether asked for, or not, by the plaintiff. The co-operation of a jury seems to have been intended as a protection for the absent party, against whom damages were to be assessed. In the absence of an express provision to that effect, we do not feel authorized to treat it as repealed. *Olivier v. Cannon*, 18 La. 474.

It is therefore ordered, that the judgment of the District Court be reversed, so far as relates to the question of damages, and that the case be remanded for further proceedings according to law; but that it be, in all other respects, affirmed. The plaintiff and appellee paying the costs of this appeal.

Barthe and Buisson, for the plaintiff.

C. M. Jones, for the appellant.

PIERRE ST. LUC RICARD v. PETER FRENCH KIMBALL and another.

The master and owner of a steamer plying between the port of New Orleans, and the different towns on the Mississippi, or its tributary streams, must be sued in the parish proved by witnesses to be that of his domicile; and this, though he may have declared, in the enrolment of his boat, taken out before the inception of the suit, that his usual place of residence is in the place where the action was brought.

APPEAL from the District Court of the First District, *Buchanan, J.*

MARTIN, J. The defendants are appellants from a judgment for the value of a slave, drowned through the want of skill and neglect of the persons who navigated the steamer *John Linton*.

be advanced by the party when he files his petition or answer praying for a trial by jury, otherwise, said prayer shall be disregarded, and the case tried by the court; and the cases now pending in which a trial by jury is asked for, shall be stricken from the jury docket, unless the compensation to be allowed to jurors is advanced by the party demanding a trial by jury.

Ricard v. Kimball and another.

The defendant Kimball, excepted to the jurisdiction of the court, on the score of commorancy, he being domiciled in the parish of Natchitoches, and sued in that of Orleans. The other defendant, Satterfield, urged as an exception, that he is not an owner of the boat, nor of any part thereof. The exceptions were overruled; but the right was reserved to Satterfield to plead in his answer the matters urged in his exception. The defendants answered; the plaintiff had judgment, and the former appealed.

Kimball proved, by the testimony of a respectable witness, his residence in the parish of Natchitoches, at that time, and for several years before. Another witness of this defendant deposed to the same effect. In opposition to this, the plaintiff's counsel read the enrolment of the boat, in which this defendant, as owner of the boat, stated himself to be of the city of New Orleans. The date of the enrolment is the 2d of January, 1839; and the present suit was brought on the 24th of March, 1840. Two witnesses were examined in December, 1840. They both depose that Kimball was a resident of Natchitoches, at that time, and had been so for several years before, which include the inception of the suit. It has, however, been contended, that, as in taking the enrolment, this defendant declares himself to be of the city of New Orleans, he must be considered as a resident of that city, in all matters which relate to the boat.* This appears to us a *non sequitur*. One of the witnesses declared that Kimball had a family at Natchitoches. One of them says, that he has been often at his house there; and the other says, that he has been so, as late as the month of July, that is, about three months after the inception of this suit. Nothing authorizes us to withhold credit from the testimony of these two witnesses. The owner of a steamboat plying between the port of New Orleans, and the different towns on the Mississippi, or its tributary streams, may well style

* The affidavit of Kimball, made for the purpose of procuring the enrolment of the steamer, recites: "I, Peter French Kimball do swear, according to the best of my knowledge and belief, that the ship, or vessel, called the John Linton, is, &c.; that my present usual place of abode or residence is in the city of New Orleans, State of Louisiana," &c. This affidavit was dated, 2d January, 1839.

Ricard v. Kimball and another.

himself of the city of New Orleans ; and if he has his house and family in Natchitoches, may well avail himself of his domicile there. The court, in our opinion, erred in overruling the exception.

The ground upon which it is contended, that the other defendant is a part owner in the boat, is a document by which it appears, that on the 1st of January, 1840, he loaned to his present co-defendant, five thousand dollars, to be repaid during the months of June, 1840, with interest, or by making him a title for that amount in the steamboat John Linton, which title was to take effect from the day that Kimball purchased her. It is clear, that at the inception of the suit, and on the day on which the exception was filed, both of which preceded the time of payment of the money loaned, the property of the whole boat remained in Kimball. The truth of the exception must be tested by the existing circumstances, on the day on which it was filed. The obligation of the borrower being to repay the money, or give an interest in the boat, was a disjunctive one, and he had the choice of either. The court in our opinion, erred, in overruling the exception of this defendant.*

It is therefore ordered, and decreed that the judgment be annulled, and reversed, and that the exceptions of both the defendants be sustained ; and that the plaintiff's petition be dismissed, with costs.

R. N. and A. N. Ogden, for the plaintiff.

L. C. Duncan, for the appellants.

* In answer to an interrogatory propounded by the plaintiff, Satterfield stated, that he had never owned any part of the boat.

JAMES LITTLEFIELD and another v. THOMAS W. BEAMIS.

In an action for a rescission of a purchase made by plaintiffs of defendant's interest in a partnership existing between them, as to the value of which they were deceived by the fraudulent representations of the latter, for a dissolution of the partnership on account of fraud, and for an account: *Held*, that the main issue between the parties being one of fraud, a document showing exorbitant and unfair charges by plaintiffs for merchandize furnished by them to the partnership, was admissible in evidence under the issue.

It is no ground for a new trial, that a juror took up and looked over certain balance sheets, which had been rejected as inadmissible, in an action for the dissolution and settlement of a partnership, where the counsel of the party against whom they were offered, noticed the fact at the time but made no objection, and the papers were not taken by the jury into their room, and it was not shown that their contents were communicated to the other jurors, or that they did or could exercise any influence over the jury in making up their opinions.

No law requires that a jury shall carry with them into their consultation room all the documents and papers submitted to them. It is at their pleasure to do so, or not.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Hoffman*, for the appellants.

L. C. Duncan, for the defendant.

GARLAND, J. The plaintiffs and the defendant were partners in trade, the former residing in Massachusetts, and the latter in New Orleans, where the business was transacted. The connection was formed in the month of September, 1836, and it was intended that it should continue for three years; but in the commencement of the year 1839, the parties became dissatisfied with each other, and, all confidence between them being lost, the plaintiffs sent an agent to this city, for the purpose of bringing the partnership to a close, which was effected by the plaintiffs purchasing the interest of the defendant. This was done early in March, 1839. About two years after, they commenced this suit, alleging various acts of fraud and misconduct, on the part of the defendant in the management of the affairs of the firm, and concealments of different transactions, whereby, they were injured and induced to give more for the interest of the defendant than they would otherwise have done. The petition and supplement allege a variety of transactions and acts as fraudulent, and

conclude by praying for a rescission of the sale or purchase of Beamis' interest in the firm ; a dissolution of it ; that the defendant be compelled to render a full account ; that the accounts be referred to auditors for settlement, and for judgment in their favor. The answer negatives, in the strongest manner, all the allegations of the petition, and, prays that the cause may be tried by a jury. It was so tried, and, after a long investigation, a verdict was given for the defendant, and the plaintiffs have appealed.

The counsel for the plaintiffs relies principally, on a bill of exceptions taken to the Judge's permitting a certain document annexed to the evidence of Loring Thayer to be read, with his explanations in relation to it, as stated in his deposition. The witness was stating the causes that led to the rupture between the plaintiffs and defendant, and the probable consequences of it to the plaintiffs, if the settlement and purchase had not been made. The defendant complained of extravagant charges of interest against him, and overcharges in the invoices of goods sent to him ; and the witness produced an agreement, between himself and the plaintiffs, by which he (witness,) was to furnish a large portion of the stock for the New Orleans store, and to charge prices ranging from ten to fifteen per cent. above the ordinary rates, the profits of which he was to divide with the plaintiffs. The ground of objection was, that the document and evidence was not admissible, under the issues made by the pleadings, and could not be received until a decision was had upon the pending questions, and that it only went to lessen or increase the balance on a final settlement. The Judge did not err in admitting the testimony. The main issue between the parties was one of fraud ; and it is shown, that a want of confidence and a mutual suspicion of each other, entered into the consideration for making the settlement ; the document was, therefore, admissible, as it went to show that the suspicions of the defendant were well founded, and that there was sufficient cause for dissolving the partnership.

The counsel for the plaintiffs moved for a new trial, on the ground of misconduct of one or more of the jury, and of the verdict being contrary to law and evidence. The misconduct complained of is, that the defendant offered to submit as evidence certain papers, which he offered a witness to prove to be balance

sheets taken from the books, and exhibited to the plaintiffs, which were rejected; but, in the argument of the case, the counsel for the defendant referred to them, and used them as memoranda, instead of referring to the books. After he had got through with them, he laid them on a chair near him, when one of the jurors, who was sitting near, took up the papers, and, after looking over two or three pages, laid them down again. This attracted the notice of one of the plaintiffs, and of his counsel at the time, but they made no objection then. The jury did not have the papers in their retirement; nor is it shown, that they did or could exercise any influence over them in making up their opinion. Only one of the jurors looked at the papers in a cursory manner, and it is not shown that what he saw was repeated to his fellows. Another ground is, the jury retired and made up their verdict without having all the evidence upon which the cause was tried, before them. We know of no law that makes it the duty of the jury to carry all the documents and papers submitted to them, into their consultation room. They have a right to do so, and, as a general rule, it is best to have them for reference; but if the jurors remember the contents, we see no more reason for taking them with them, than there is for taking witnesses who have given parol evidence. The document, which it is said the jury did not have with them, is an account made out by the plaintiffs against the defendant, stating the various items claimed of him. If the jury thought the plaintiffs had no claim at all against the defendant, we do not see what possible effect a statement in detail could have had upon their judgment. We concur with the Judge below, in the conclusion to which he came, and, upon the merits, are satisfied with the verdict.

Judgment affirmed.

ATHALIE SOUBIE v. MARIE MADELEINE EVELINA SOUGERON.

To succeed in a redhibitory action, the purchaser must have taken such care of the thing sold, as might be expected from a prudent father of a family.

Action to rescind the sale, and recover the price of a slave alleged to be affected with a redhibitory disease. On the trial it was proved, that the slave was sent by plaintiff to a hospital about fifteen months after the institution of the suit, in a dying condition, where she expired six or seven days after. There was no evidence, that she had ever been attended by a physician. *Held*, that it is not enough to show the existence of the disease, at the time of the sale; that to enable the plaintiff to recover, it should have been shown, that the slave had received proper medical treatment.

APPEAL from the District Court of the First District, *Buchanan, J.*

MORPHY, J. This action was brought on the 8th of April, 1839, to annul the sale, and recover the price of a negro girl named Angelina, bought of the defendant, on the 16th of February, 1839, and alleged to have been then laboring under a pulmonary consumption, which existed long before the sale. The defendant specially denies, that the slave was at the time of the sale, or before, affected with any redhibitory malady. There was a judgment below in favor of the plaintiff, from which this appeal was taken.

The evidence shows, that on the 21st of July, 1840, that is, more than seventeen months after the sale, the girl Angelina was sent to the Charity Hospital, where she died six or seven days after. When she was sent there, she appeared to the house surgeon to be laboring under a pulmonary consumption, and already in a desperate condition, but he did not examine her body after her death. A witness living at the plaintiff's house, and produced by her, testifies, that the slave had been sick about six months, or more, before her death, and that he never saw any physician called in to attend on her. This agrees with the statement of one of the defendant's witnesses, Gauthier, who saw Angelina, about nine months after the sale; she then appeared to him not only well, but he thought, that she had grown fatter than she was before. There is no direct evidence, that the disease ex-

Soubie v. Sougeron.

isted before the sale to the plaintiff, or that it made its appearance within three days after the sale, so as to create a legal presumption of its pre-existence ; but great reliance seems to be placed on a certificate obtained from two gentlemen of the faculty. It is in the following words, to wit :

" Nlle Orléans, ce 26 Mars, 1839.

" Nous, soussignés, docteurs en médecine de la faculté de Paris, appelés par Mademoiselle Soubie pour examiner sa négresse Angelina, et constater son état, certifions avoir mis dans nos recherches tout le soin dont nous étions capables, et avoir reconnu chez sa dite négresse un ensemble de phénomènes dont la réunion constitue l'affection désignée par les auteurs sous le nom de Chlorose. Cette maladie paraît consister dans une altération particulière du sang, et ne se manifeste qu'à la suite de circonstances dont l'action ne devient sensible qu'après un tems généralement assez long. En outre sa toux qui existe actuellement, et qui, au dire de la malade, se renouvelle à la moindre occasion, doit faire craindre pour elle le développement d'une altération grave du poumon, dont la marche serait d'autant plus rapide qu'elle serait produite dans les conditions que nous savons être extrêmement favorables à l'existence de cette maladie.

" Des faits que nous venons de déposer, il nous paraît raisonnable d'établir :

" Que l'état morbide général dont il vient d'être fait mention, remonte à une époque que nous ne saurions fixer rigoureusement, mais qui nous semble excéder un an :

" Que sa toux, que nous avons dit se reproduire de tems à autre, est d'un fâcheux augure, en tant que développée dans les circonstances actuelles, elle nous paraît tendre vers une maladie dont le résultat serait pour la négresse malade une mort inévitable.

" P. A. LAMBERT, D. M. P.

" WM. GUESNARD, D. M. P."

After reading over several times this document, which, it must be admitted, is drawn up *secundum artem*, we have been unable to discover in it any thing showing the actual existence, at its

date, of a pulmonary consumption in the slave Angelina. The learned gentlemen certify, that she had the *Chlorosis*, a well known disease of females, commonly called the green sickness. They express the opinion, that she had been laboring under this complaint for a year back, and that, from symptoms which they describe, it may lead to an affection or disease which would be followed by death. This certificate, which by consent was admitted as evidence, does not satisfy us, that the slave had, before the sale to plaintiff, the disease of which she died seventeen months after; and in this opinion we are confirmed by the testimony of witnesses who saw, and knew the girl for some time before she was sold. One of them, Dr. P. F. Thomas, who was the defendant's family physician, testifies, that, in 1838, or thereabouts, he was called upon to see this girl who was troubled with worms, and that he paid her only a few visits as she was not long sick; that after she was sold to the plaintiff, whose physician he had also been for some time, she (the plaintiff,) called one day at his office, and asked him whether he would deliver to her a certificate about the health of Angelina, which could enable her to return the slave to the defendant, and that she would pay him well for it. He replied, that he was not in the habit of making such bargains, and begged her to leave his office, remarking, at the same time, that he had seen the girl before, and never knew her to be subject to any redhibitory disease. But even admitting the *chlorosis* to be a redhibitory malady, or to have led to the disease of which the slave died, the course which the plaintiff appears to have pursued, should in our opinion, preclude her from recovering. A few days after obtaining the certificate so much relied on, she brought the present suit. From that time up to the 21st of July, 1840, when she sent the girl to the Charity Hospital in a dying condition, she has given no account of her, nor has it been shown, that she was ever attended by a physician. Had the slave received proper medical treatment, the disease of which she died might not have been engendered, or might not have had a fatal termination. To succeed in a redhibitory action, it is not enough to obtain from professional gentlemen well written certificates, or even to show the existence of a disease at the time of the sale; the purchaser is bound to take such care of the thing

The Second Municipality of New Orleans v. The Commercial Bank of New Orleans.

sold, which he intends to return, as might be expected from a prudent father of a family. 1 Robinson, 46. The plaintiff is the less excusable, as she was cautioned by the physicians of the necessity of care and attention, to avert the disease with which the slave was threatened.

It is, therefore, ordered, that the judgment of the District Court be avoided and reversed, and that ours be for the defendant, with costs in both courts.

W. S. Upton, for the plaintiff.

Bodin, for the appellant.

THE SECOND MUNICIPALITY OF NEW ORLEANS V. THE COMMERCIAL BANK OF NEW ORLEANS.

The thirty seventh section of the Act of 1 April, 1833, incorporating the Commercial Bank of New Orleans, which exempts its capital from the payment of any tax imposed by the State, or any parish, or body politic under its authority, does not exempt from such taxation, slaves, or other real property held by the bank. Nothing is exempted but the three millions of dollars furnished by the stockholders for its operations.

APPEAL from the Commercial Court of New Orleans, *Watts*, J. This was an action by the Second Municipality of New Orleans, to recover taxes due on certain slaves and other real property owned by the Bank. The defendants claimed to be exempt from any liability under the thirty-seventh section of their charters, which declares: "That the capital of the said Commercial Bank of New Orleans shall be exempt from the payment of any tax imposed by the State, or by any parish or body politic, under the authority of the State, during the continuance of the charter of said company, in consideration of the advantages to be derived by the public by the accomplishment of the object for which the said company is incorporated." Act of 1 April, 1833, 1 Sess. Acts, p. 151. There was a judgment in favor of the plaintiffs; and the defendants appealed.

Rawle, for the plaintiffs.

Canon, for the appellants.

Thayer v. Littlefield.

MARTIN, J. The Commercial Bank is appellant from a judgment which rejects its pretensions to an exemption from taxation on its real property, under the 37th section of its charter which exempts its capital from taxation. The counsel urges that the First Judge erred in not considering this real property as part of its capital, as it must have been purchased with the money it received from the stockholders directly, or from its debtors to whom that money had been loaned. The First Judge did not err. Nothing is exempted from taxation, but the capital of the bank, to wit; a sum of three millions furnished by the stockholders for its operations. It had no right to withdraw from taxation property, which, before it acquired it, was liable to taxation, in the hands of its former owners.

Judgment affirmed.

LORING THAYER v. JAMES LITTLEFIELD and another.

Where the record does not contain all the evidence adduced on the trial, and there is no statement of facts, bill of exceptions, nor assignment of errors, and the clerk of the lower court certifies that part of the documentary evidence, not included in the record, was not to be found among the papers, and there is no evidence to show that it has been since discovered, the appeal must be dismissed, as a *certiorari* would be useless.

APPEAL from the District Court of the First District, Buchanan, J.

L. C. Duncan, for the plaintiff moved to dismiss this appeal, the record containing no statement of facts, bill of exceptions, or assignment of errors, and it appearing from the certificate of the clerk that all the evidence was not transcribed; citing *Field v. Sibley*, 2 La. 496. The certificate stated, that the record, "contains a transcript of all the proceedings, as well as of all the documents filed, and all the testimony adduced on the trial, except document No. 1, which is not to be found among the papers, and also excepting the record of the suit of *N. Goodale and Wife v. J. Littlefield & Co.*, offered in evidence with leave to either party to use

what parts of it they choose, both here and on appeal, numbered 17420 of the docket of this court."

Micou and Hoffman, for the appellants, prayed for a *certiorari*, citing the Code of Practice, art. 898, 2 La. 301, and *Bell v. Bell et al.* 4 La. 470.

BULLARD J. The appellee moves to dismiss this appeal, on the ground that the record contains neither all the evidence adduced on the trial below, nor a statement of facts, nor any bill of exceptions, or assignment of errors.

The appellant admits that the record is imperfect, but contends, that after answer to the appeal on the merits, it is too late to make the objection, and that he is entitled to a *certiorari* to supply the defect.

The first objection has no weight ; because, if both parties were to agree to it, this court would not try any case on its merits, without having before it all the evidence on which it was tried in the first instance, or a statement of facts agreed upon. Under ordinary circumstances, the *certiorari* would be allowed under art. 898, of the Code of Practice. But it is manifest, in this case, that the *certiorari* would be useless, inasmuch as the clerk certifies that document No. 1, is not to be found among the papers, nor the record of *N. Gooda'e & Wife v. J. Littlefield & Co.*, offered in evidence with leave to either party to use what parts of it they chose both below and on the appeal, and nothing shows that those documents have since been found, so as to enable the clerk to furnish a copy, and thus complete the record. The case in 4 La. 470, referred to by the counsel for the appellants, supports this view of the case.

Appeal dismissed.

THOMAS WELLS v. JAMES McMASTER.

A copy of a bill of sale, certified by the Register of a county in another State, as made from the records of his office books, in which it was transcribed, on a certificate from the Clerk of the County Court of that county, that it had been proved before him by the two subscribing witnesses thereto, is inadmissible, being but a copy of a copy, and the evidence disclosing the existence of the original, which was not produced.

One claiming under a bill of sale, signed by an attorney in fact of the vendor, must prove the authority of the attorney.

APPEAL from the Parish Court of New Orleans, *Maurian, J.*

MARTIN, J. The defendant is appellant from a judgment, by which the plaintiff has recovered from him a slave, with wages, and which decrees, that in case he fails to surrender the slave, he shall pay the value thereof. His counsel has put the case before us on a bill of exceptions, taken to the opinion of the First Judge, admitting in evidence the copy of a bill of sale, by which the plaintiff acquired the slave sued for, notwithstanding the defendant's opposition to his admission, on the ground that it disclosed the existence of the original, which was not produced. The copy was certified by the Register of the County of Davidson, in the State of Tennessee, as taken from the records of his office books. It is very clear, that we have only the copy of a copy, for the Register informs us, that he has taken the copy from the records of his office books. The copy of the bill of sale is followed by a certificate of the Clerk of the County Court, which attests, that the two subscribing witnesses to the bill of sale deposed before him, that they were acquainted with James A. Richardson, attorney in fact of B. Richardson, the plaintiff's vendor, who acknowledged the sale in their presence as his act and deed. On this acknowledgment, the bill of sale was registered. It is clear, that there are two insuperable objections to the admission of this document. The original was proved in the County Court, and, on the certificate of that probate, it was transcribed in the Register's books, from which that officer has given a copy. The original does not appear to be in his possession, and was probably resumed by the plaintiff after

Miller v. The First Municipality of New Orleans.

the registry. Another objection is, that there is no evidence of the authority of the signer of the bill of sale, to transfer the title of B. Richardson.

It is, therefore, ordered and decreed, that the judgment be annulled and reversed, and the case remanded for further proceedings, with directions to the Parish Court, not to admit the document excepted to; the plaintiff and appellee paying the costs of this appeal.

Peyton and J. W. Smith, for the plaintiff.

Lockett and Micou, for the appellant.

STILES MILLER v. THE FIRST MUNICIPALITY OF NEW ORLEANS.

APPEAL by the defendants, from a judgment of the Commercial Court of New Orleans, *Watts, J.*, in favor of the plaintiff, for the amount claimed by him.

Rawle, for the plaintiff.

Roselius, for the appellants.

GARLAND, J. In the month of December, 1839, the Council of the First Municipality of New Orleans, passed an ordinance, directing that Custom House Street, from Royal to Franklin Streets, should be paved with blocks of wood, the work to be paid for as follows: "that on every application of the contractor, for the settlement of any portion of the paving, by him delivered to and accepted by the Surveyor, the said contractor shall be bound to receive in payment, the notes, or money to be collected from the property holders fronting on that part of Custom House Street to be paved with wooden blocks; and for the balance, the notes or bonds of the Municipality, payable in twelve months, bearing interest at six per cent per annum; it being agreed and understood, that it shall be optional with the property holders, at the completion of the work, to pay in cash, or to furnish their notes payable to the order of the Municipality, at six, and twelve months

credit, bearing interest from date, until paid, at the rate of six per cent per annum, and the Municipality to have the right of paying in cash, or in notes or bonds, bearing interest at the rate of six per cent per annum, payable in twelve months, and subject to a further renewal of twelve months, if desired by the Municipality."

Subsequent clauses of the ordinance provide for the adjudication of the contract to the lowest bidder, and the depositing of articles of agreement with the Mayor, for the inspection and information of those desiring to become bidders. Another ordinance, passed sometime after, recognizes the plaintiff as being the lowest bidder, at \$3 50 the square yard, modifies the first ordinance in some unimportant particulars, and directs a written contract to be entered into with the plaintiff, which seems never to have been executed; at least, none is shown. The contract is, therefore, to be tested by the ordinances.

The plaintiff executed the work, in a manner satisfactory to the City Surveyor, who received it from time to time. Bonds of the Municipality, for one-third of the contract price, were also received by the plaintiff, and he also received accounts against different individuals, on some of which he received money, or notes payable to the Municipality; but as some of the property holders refused to pay in money, or to give their notes, payable as required, the plaintiff now seeks to compel the Municipality, either to give him the notes of those proprietors, endorsed as stipulated, or to pay him the amount. This demand is resisted, as the defendants allege, that it was not the duty or contract of the Corporation, to procure the money from the individual proprietors, or to get their notes; but that the plaintiff was to do it, and to take the risk of a refusal, and the chance of compelling them to pay; and that the receipt of the accounts, that were made out by the officer of the Municipality, shows that this was the intention of the parties. The accounts against the individual proprietors, were made out by the Treasurer of the Municipality. It is not shown that they were in favor of the plaintiff, but the evidence produces a contrary impression; and the witness says, he does not know whether the plaintiff took the bills in payment, or whether he took them to aid in their collection. The receipt offered

Miller v. The First Municipality of New Orleans.

in evidence, does not show any thing more than that the plaintiff received of the Municipality its notes for the sum it was bound to pay, about which there is no difficulty. The sole question is, which party is bound to collect the money or notes from the individual proprietors, and to take the risk of getting them. The Municipality, by its ordinance, undertook to give the contractor a certain sum for doing certain work. To pay for it, their own notes were to be given for a portion, and the money or notes of certain individuals for the remainder. To collect this money, or to enforce the delivery of those notes, the Municipality supposed they had a legal authority; or there was an understanding, positive or implied, that if the money was not paid the notes would be given. At least the plaintiff might well suppose so. It is very certain that the plaintiff was to be compensated for his labor; and as it is shown to have been performed to the satisfaction of the officers of the corporation, they must show that he has been paid.

From the terms of the ordinance, and the fact that the notes were to be payable to, and endorsed by the Municipality, we think it clear, that the corporation intended to have the money collected, or the notes procured by its own officers. We see no intention of constituting the plaintiff an officer of the Municipality, nor any reason for it. He was doubtless anxious that the money and notes should be procured as soon as possible; but we cannot presume that he intended to release the Municipality, because he undertook to assist it in its effort to comply with its engagements. Had such been the purpose, it would have been very easy to express it in the receipt given in evidence.

Judgment affirmed.

THE CITY BANK OF NEW ORLEANS V. JOHN S. WALTON.

No action whatever, executory or ordinary, can be maintained against a bankrupt, regularly discharged under the act of Congress of 19th August, 1841, for a debt contracted previous to his bankruptcy, where the plaintiff was placed on the list of creditors filed in compliance with the act. The action must be against the assignee.

The consent of the mortgagee to the sale of property mortgaged with the clause, *de non alienando*, evidenced by joining in the act of sale, is a waiver of the right of the direct action, and he cannot afterwards proceed without notice to those who may have subsequently acquired rights. Any proceedings must be against the third possessors of the property.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Lockett and Micou*, for the plaintiffs. With regard to the plea of his discharge, as a bankrupt, filed by the defendant, its object is answered by the waiver of any personal judgment against him.

The only question is, whether the property should have been ordered to be sold, without making the assignee of John S. Walton or of S. C. Ogden, or the representatives or heirs of G. B. Ogden, parties to the suit.

The plaintiff contends, that there was no necessity for making them parties.

The clause, *de non alienando*, relieves the mortgagee from the necessity of noticing any subsequent sale to the prejudice of his mortgage.

This exemption was not waived, but strictly preserved in the sale to S. C. Ogden.

The substance of the agreement of the Bank, in that sale, was, to await the maturity of the new notes before enforcing its original mortgage; but, if those notes should be protested, the right to proceed on the original mortgage, was reserved as fully as if the Bank had not intervened in the act.

The contingency having arrived by the protest of all the new notes, the Bank has the right to proceed on its original mortgage.

The Bank has not waived the benefit of the clause, *de non alienando*, except as above stated.

It was not necessary to make the assignee of Walton a party, because he had sold the property long before his bankruptcy.

The same reason applies to the assignee of Samuel C. Ogden, who had also sold.

It was not necessary to call in the heirs of G. B. Ogden, because all the renewals allowed to him by the Bank, must necessarily be construed to have been permitted, with reference to the stipulations of the act of sale to S. C. Ogden, under whom G. B. Ogden held title.

The loan in this case was granted under the charter of the City Bank, regulating loans on mortgages. The eighth section confers upon the Bank all the rights and privileges attached to mortgages under the charter of the Consolidated Association. See Act of Incorporation, Acts of 1831, p. 34.

The charter of the Consolidated Association secures to it the privilege of proceeding on mortgage, contradictorily with the original mortgagor, notwithstanding any failure, death, or transfer. See the 22d section of the charter. 2 Moreau's Digest, 404.

J. C. Clarke, for the appellant.

GARLAND, J. In May, 1836, the plaintiffs loaned the defendant \$15,000, secured by a mortgage on a half square of ground in the *faubourg* Annunciation. He paid \$3000, the amount of the first instalment. In the act of mortgage, it was stipulated that Walton should not alienate the property, to the prejudice of the plaintiffs' mortgage. On the 1st of March, 1839, Walton sold the property to Samuel C. Ogden, for \$17,000, of which \$7000 were to be paid in three years, from the 9th of February, 1839, and \$10,000 in four years from that date. In this act the petitioners intervened, and agreed, that they would receive the notes of said Samuel C. Ogden, endorsed by George B. Ogden, discount them, and apply the proceeds to the payment of Walton's debt; but his bond and mortgage were to be kept in full force and effect, until the notes were paid. On the 9th of June, 1842, Samuel C. Ogden sold the piece of ground to George B. Ogden, who engaged to pay his notes; but to this act, the City Bank was not a party. In February, 1841, George B. Ogden wrote a letter to the President and Directors of the City Bank, informing them that S. C. Ogden's note became due that day, and that he wished to give his own note for \$4000, in part payment, permitting the mortgage note of \$7000 to remain as security. This arrange-

ment was acceded to, and the note of Geo. B. Ogden was renewed from time to time, until it was reduced to \$2500. The two notes of Samuel C. Ogden, of \$5000 each, due in February, 1843, were protested for non-payment. In the course of the year 1842, both Walton and Samuel C. Ogden were declared bankrupts, and have been regularly discharged. George B. Ogden died, and no one has been appointed to administer his succession. In this state of affairs, the City Bank presented their petition, claiming a judgment against Walton on the original contract, and a sale of the property mortgaged, to satisfy the same, without making the assignee of Walton a party, or giving any notice to the heirs or legal representatives of George B. Ogden, deceased, or to the assignee of Samuel C. Ogden.

To the petition presented as aforesaid, Walton pleaded his discharge, as a bankrupt, and prayed to be dismissed. It was admitted, that he was discharged, but the court said as there was a clause, *de non alienando*, in the mortgage, a judgment should be given, ordering the property to be sold, and a sufficiency applied to the payment of the debt owing to the plaintiffs; the excess, if any, reserved by the purchaser to be paid to whomsoever might own the ground at the time. From this judgment Walton has appealed.

There are various reasons why this proceeding cannot, in our opinion, be maintained :

First. Because, it being admitted that Walton is a bankrupt, regularly discharged in the United States Court, no action, executory or ordinary, can be maintained against him, for a debt contracted previous to his bankruptcy, when the creditor has been placed on the list of creditors, filed in compliance with the act of Congress. Laying out of view entirely the question of jurisdiction in the court, we are satisfied, that if any action can be maintained at all, it must be against the assignee, and not against the discharged debtor.

Secondly. The Bank having intervened in the act of sale from Walton to Samuel C. Ogden, and consented to the transfer of the property mortgaged, we think the clause, *de non alienando*, in the mortgage, is modified in its effects, if not entirely destroyed, and that the proceedings should be against the third possessors of the

The State v. The Judge of Probates of Jefferson.

property. The Bank also knew of the sale from Samuel C. Ogden to George B. Ogden, and treated the latter as the real debtor for a considerable time previous to the institution of these proceedings; it is, therefore, not a proper course to pursue now, to disregard all their acts of recognition, and to fall back upon the direct action, which the insertion of the clause, *de non alienando*, in the original mortgage gave. The consent of the Bank to the sale from Walton to Samuel C. Ogden, was a waiver of the right of the direct action; and the plaintiff cannot resume it, without notice to those who have subsequently acquired rights.

The judgment of the Commercial Court is, therefore, annulled and reversed, and the case dismissed at the costs of the plaintiff in both courts.

THE STATE v. THE JUDGE OF THE COURT OF PROBATES OF
JEFFERSON.

Where a Judge of Probates has rendered a judgment refusing to homologate the proceedings of a family meeting, he cannot be compelled by *mandamus* to do so.

RULE on *Smith*, Judge of the Court of Probates of the parish of Jefferson, to show cause why a *mandamus* should not be issued, commanding him to homologate the proceedings of a family meeting.

Labarre, for the plaintiff in the rule.

BULLARD, J. The rule in this case must be discharged. The Judge of the Court of Probates has rendered a judgment, refusing to homologate the proceedings of a family meeting. We cannot, by *mandamus*, order him to reverse his own judgment and give a different one, because we cannot enforce such an order.

Rule discharged.

SURVILLE BOUQUEVALTE V. DANIEL YOUNG.

Plaintiff having recovered damages in an action for a malicious prosecution tried by a jury before a Parish Court, defendant appealed to the District Court, which confirmed the judgment. There was no prayer for a trial by jury before the District Court; but defendant moved for a new trial in that court, on the ground, that the case could not be tried by it without a jury. The new trial was refused, and the defendant again appealed. *Per Curiam*. It was too late to ask for a jury on a motion for a new trial; and it may well be doubted whether a trial by jury can be required in the District Court, sitting for the trial of appeals.

APPEAL from the District Court of the First District, *Buchanan, J.*

Labarre and J. Seghers, for the plaintiff.

McKinney and Preston, for the appellant.

MORPHY, J. This is an appeal taken from a judgment of the District Court of the First District, in a case brought before it by appeal from a judgment of the Parish Court of the Parish of Jefferson. This action is for damages for a malicious prosecution instituted by the defendant, who is charged with having maliciously, and without any probable cause whatever, procured the petitioner to be arrested and imprisoned, by making an affidavit, that he had stolen from him a lug sail for an oyster boat, from which accusation the petitioner was afterwards discharged by the committing magistrate. The jury who tried the cause in the Parish Court, brought in a verdict for \$150, with which the court expressed its satisfaction. The case was submitted without argument in this court, and no points have been filed by the appellant, showing on what grounds he complains of the judgment rendered against him. It may well be assumed, that they are those on which he prayed for a new trial in the District Court. These were, that the judgment was contrary to law and evidence, and that the cause could not be tried by the court, because a jury was prayed for.

We concur in opinion with the District Court, as to the correctness of the verdict and judgment, in the Parish Court of Jef-

Rosine and others v. Bonnabel and others.

ferson. The facts alleged were proved, and the malice of the defendant was shown by his own declaration after the arrest, that he never believed, that the plaintiff had been guilty of the charge.

A jury had been prayed for, and had tried the case in the Parish Court. If the appellant to the District Court wanted the case to be there tried again by a jury, he should have prayed for it, which he has not done. It was too late to call for a jury on a motion for a new trial. It may, moreover, well be doubted whether a trial by jury could be asked in the District Court, considered as an appellate tribunal. In certain cases provided for by law, appeals from the Parish Courts must be taken before this court, where such a mode of trial cannot be had. Code of Practice, art. 569.

Judgment affirmed.

ROSINE and others v. MARCELLIN BONNABEL and others.

Parol evidence is inadmissible to establish a fact of which it appears that the party had written evidence, not accounted for.

Manumission cannot be proved by parol.

The laws of foreign States may be proved by parol, unless they appear to be statutory or written law.

Parol evidence is admissible to prove that, by the laws of Spain, a copy of a judicial proceeding, certified by a notary public of the Cabildo, under his signature and *paraph*, his capacity being attested by three other notaries, certifying that his acts are entitled to full faith and credit, would be admissible in any Spanish tribunal. Such evidence having been introduced, proof of the capacity and signatures of the notaries, is all that is necessary to the authentication of the copies. Since the act of 28th February, 1837, ch. 33, requiring "the courts of this State to receive the attestation or certificate of any American consul, general consul, vice-consul, or commercial agent, residing in any foreign country, as legal evidence of the attributes, and official station or authority of any magistrate or other civil officer in such foreign country, under the laws thereof," parol proof of such capacity, which is essentially secondary evidence, is inadmissible; but proof under the great seal of the nation is still good. The capacity and signatures of notaries to copies made out before the act of 1837, may still be proved by parol, under the decision in *Las Cayas v. Larienda's Syndics*, (4 Mart. 283.)

It is only the attributes and official station of foreign civil officers which are required,

Rosine and others v. Bonnabel and others.

by the act of 28th February, 1837, to be proved by the consular certificate, or that of a commercial agent. Parol evidence is admissible to prove the laws of a foreign country, not shown to be statutory or written, relative to the forms of authentication of copies of judicial proceedings.

The acts of foreign notaries do not prove themselves, except as to the protests of foreign bills of exchange.

APPEAL from the Parish Court of New Orleans, *Maurian, J.*

BULLARD, J.* Rosine, the original plaintiff, who died *pendente lite*, had sued for her liberty, and that of her minor children, alleging that her former mistress manumitted her in St. Jago de Cuba, in the year 1806, for and in consideration of three hundred dollars, which were paid her in hand, and promised to cause the deed of emancipation to be executed before the proper authority when called upon. After the death of Rosine, her children continued to prosecute the suit, having made new parties defendants, and one of them bringing her own children as co-plaintiffs, assisted by a *curator ad hoc*. Ultimately, after a delay of more than ten years, the case was submitted to a jury, who found a verdict for the defendants, and the plaintiffs have appealed.

The case is before us upon three bills of exceptions, from the two first of which it appears, that the plaintiffs offered to prove by witnesses, who had been sworn in the cause, that Rose Facquebon, or Jacson, the former mistress of Rosine, had, either at St. Jago de Cuba, or at New Orleans, or at both places, told them that she had received of Rosine \$300 for her liberty, and that she had signed a private act of emancipation, and promised to ratify it before the proper authorities, and that Rosine was free; and also various acts and declarations of the former mistress relative to the slave Rosine. This evidence was properly refused; because it appeared, that there had been written evidence not accounted for, upon which the plaintiff relied to support her claim to freedom, and because manumission cannot be proved by parol.

It appears by the third bill of exceptions, that the plaintiffs offered in evidence a document in Spanish, purporting to be a transcript of certain judicial proceedings before a tribunal in St.

* MORPHY, J. having been of counsel in this case, did not sit on its trial.

Jago de Cuba, instituted by Rosine against her former mistress ; and offered, at the same time, to prove by the deposition of the Spanish Consul in New Orleans, that the manner in which said document is certified and authenticated is the legal manner in the Spanish dominions, and that before the tribunals of that country, the said document would be admitted as making full proof of itself. The counsel also offered to prove the genuineness of the signatures of the notaries who signed said document, or at least of some of them, and to prove at the same time, that they were really notaries at the place and time mentioned in the certificate, at the bottom of said document. The counsel offered further to make oath that he had, since the institution of this suit, used due diligence to procure a similar document, legalized by the American Consul at St. Jago de Cuba, and also to procure the original act under private signature, by which Rose Facquebon, *alias* Jackson, had actually emancipated Rosine, and promised to ratify said emancipation before the proper authority ; but that he never received any answer to his several letters written to that effect.

The counsel for the defendants objected to the admission of the document, and of the oral evidence, on the following grounds :— That the verity of the signatures at the bottom of the document, could not be proved by oral evidence, but that the document ought to be so authenticated as to prove itself, either by an exemplification under the great seal, or by a copy, proved to be a true copy by the certificate of an officer authorized by law, such as the consul, vice-consul, or commercial agent ; and that, as the paper purports to be a judicial proceeding, it ought to have the signature of the Judge and the Clerk, and the seal of the court.

The court sustained these objections, refused to receive the oral testimony and the document, and the counsel for the plaintiffs took his bill of exceptions.

It is certain, that the document in question does not carry on its face such evidence of authenticity as to authorize its admission as evidence. Two things are wanting, to wit : 1st. Proof that it is a copy of a judicial proceeding ; 2d. That it is certified in such a manner as that, by the laws of Spain, it would be admitted as evidence in the tribunals of that country. If it would be received there, it is admissible here between the same parties, or their

ayant-cause. The whole difficulty then resolves itself into a question of fact, to wit: What is the law of Spain upon the subject of copies of judicial proceedings, when to be used in a different court from that which rendered the judgment, and in what form, and by what officer, is the copy to be authenticated? It is well settled, that the laws of foreign States may be proved by parol, unless it appear to be statutory, or written law. 5 Mart. 673.

It was, therefore, competent in our opinion, for the plaintiffs to prove by parol, that by the laws of Spain, a copy of a judicial proceeding, certified by a notary public, and of the Cabildo, under his signature and paraph, and his capacity attested by three notaries, certifying at the same time that his acts are entitled to full faith and credit, as appears to have been done in this case, would be admissible in any Spanish tribunal. Nothing would then be wanting, but proof of the capacity and signatures of the notaries, and the question remains, what would be proper evidence of those facts.

The acts of foreign notaries do not prove themselves, except in relation to the protests of foreign bills of exchange. 4 Mart. 86 and 285.

In the case of *Las Caygas v. Larionda's Syndics*, this court held, that the signature and official capacity of a notary in a foreign country, might be proved by parol. 4 Mart. 283.

Since this latter decision, the legislature has established a new mode of proving, in our courts, the attributes and official station, or authority, of civil officers in foreign countries. The act of 1837, entitled, an "Act providing for the authentication of foreign documents before the courts of the State of Louisiana," provides "that it shall be the duty of the courts to receive the attestation, or certificate of any American consul, general consul, vice-consul or commercial agent, residing in any foreign country, as legal evidence of the attributes, and official station or authority of any magistrate, or other civil officer in such foreign country, *under the laws thereof,*" &c.

Although this statute does not purport to introduce an *exclusive* mode of proving the authority of foreign functionaries, yet, since its enactment, it would perhaps exclude the proof of such capacity by parol, which is essentially secondary evidence; but the

proof under the great seal of the nation, would still be admissible ; and parol evidence might yet be received to prove the foreign law relative to the forms of authentication. It is only the attributes, and official station, which are to be proved by the consular certificate. But we cannot well see how a consular agent, at this time, could certify the official character of notaries, who attested a document seventeen years ago ; and, at the time the attestation of this document bears date, the consular agents of the United States had no such authority. If in 1626, when this copy purports to have been made out and attested, a consul of the United States had certified the official character of the three notaries, the certificate would have been null, and the instrument thus certified would have been excluded. We see no violation of principle in allowing, at this time, the same evidence of authenticity, as it relates to the instrument in question, which would have been legal and proper before the passage of the act of the legislature.

We, therefore, conclude, that parol evidence was admissible to prove, that a copy of judicial proceedings, certified as this appears to have been, would, according to the law of Spain, be admissible in her tribunals ; and to prove that the three notaries who attest the act of the officer certifying the copy, were acting notaries at that time, and that their signatures are genuine. With this preliminary proof we think the document admissible in evidence.

It is, therefore, ordered and decreed, that the judgment of the Parish Court be reversed, the verdict set aside, and the cause remanded for a new trial, with directions to the judge not to exclude parol evidence to prove the law of Spain in relation to the authentication of judicial records, and of the genuineness of the signatures of the three notaries ; and, if satisfied according to that evidence, that the document in question is admissible, not to exclude it on the ground of its wanting any other attestation, or proof of authenticity ; and it is further ordered, that the costs of the appeal be paid by the defendants.

J. Seghers and Canon, for the appellants.

Mitchell, for the defendants.

ANDRÉ MARCHESSEAU v. PAUL LONGIS.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Canon*, for the appellant.

Bodin, for the defendant.

GARLAND, J. The plaintiff alleges, that he consigned to the defendant twenty half pipes of brandy, containing 963 gallons ; that the latter refuses to give an account of the sales or value thereof, or to return the brandy. He claims \$1805 52, as the value. The defendant, after a general denial, states, that he has never refused to render an account, and has never been put in default. He claims to have deducted various charges for duties paid, storage, commissions, &c. He further alleges, that the balance that was in his hands, has been seized by the sheriff, on an execution in favor of Rosetaine & Co. against the plaintiff, and that he has paid it to the officer. He asks for a trial by jury, and for judgment in his favor. There was a verdict and judgment in favor of the plaintiff for \$207 62, with legal interest ; and he has appealed.

This is exclusively a matter of account, and depends on the evidence entirely. It is shown, that a number of pipes of brandy were consigned to the defendant, and that at the time, a limit was placed on it. The defendant sold five half-pipes at the price fixed ; afterwards the article declined very much in the market ; and, after remaining on hand for about nine months, the fifteen half-pipes were seized by the sheriff. The plaintiff in this suit, and the plaintiff in the execution then agreed, that the defendant should sell the brandy for the best price he could get, instead of having it sold by the sheriff. It was sold under this agreement for one dollar per gallon, and a sum of \$328 was paid by defendant to Rosetaine & Co., which was credited to the plaintiff. The latter now wishes to make the defendant account for all the brandy at the price originally fixed on it. This he cannot do, as it is proved, that he consented that Longis should sell for what he could get, and even proposed to a partner of the firm of Rosetaine & Co. to have it sold by an auctioneer, instead of by the sheriff. This agreement removed the limit first fixed on the brandy, and

Powell v. Williams and another.

it was probably in consequence of the article being pressed on the market, that it sold at so reduced a price. The purchaser tells us, that the market was dull at the time, and the brand on the brandy was not well known. There is a good deal of evidence in the record, in relation to the charges for duties paid, storage, commissions, leakage, evaporation, &c. All these charges, and the evidence in relation to mercantile usages, were passed upon by a jury, among the names composing which, we recognize a number of highly intelligent and experienced merchants. We have examined the testimony in reference to every item in the accounts of the defendant, and the result is so near an approximation to the conclusions of the jury, that we cannot say they erred.

Judgment affirmed.

THOMAS POWELL v. THOMAS WILLIAMS and another.

A record certified by the Clerk of the court from which an appeal has been taken, as "containing a transcript of all the proceedings, as well as of all the documents filed in the case," is insufficient, though nothing else appear to raise a doubt as to its completeness, where there is no statement of facts, bill of exceptions, or assignment of errors apparent on the record. Appellants must bring up complete transcripts of the record, with all the evidence upon which the case was tried, or show good cause why they have not done so.

Where an appellant relies upon errors apparent on the face of the record, they must be pointed out in conformity to art. 697, of the Code of Practice.

APPEAL from the Commercial Court of New Orleans, *Watts, J.* This was an action by the plaintiff, as holder and owner of certain promissory notes, drawn by the defendants. The latter excepted to the petition, alleging, that the matters therein set forth are in litigation between the same parties in an action pending before the Supreme Court; and prayed to be dismissed with costs. The exception was overruled; and the defendants, on a subsequent day, answered, protesting against the overruling of their exception, pleading a general denial as to some of the notes, and prescription and want of consideration, &c., as to the rest. There

Powell v. Williams and another.

was a judgment in favor of the plaintiff, for the sums claimed, with the exception of the amount of one of the notes. Kellar, one of the defendants, appealed.

The petition for an appeal represents, that the plaintiff "had obtained a judgment against the commercial firm of Kellar & Williams, for \$2582, with interest; that the petitioner is informed, and believes, that there is error in said judgment, and that the exception was improperly overruled." The appeal bond recites, that "whereas the above bound John Kellar, has this day filed a petition of appeal from a final judgment rendered against him as partner," &c.

The record contains a memorandum signed by the counsel of both parties, which recites, that "it is agreed, that the records of the suits of *Kellar v. Williams*, and of *Williams v. Kellar*, introduced in evidence on the trial of the exception in this case, shall not be copied in the record in case of appeal, but the copy taken up on the appeal of Thomas Powell, in the above cases, shall be used in the Supreme Court." No other evidence was introduced on the trial of the exception; but three witnesses, whose testimony is not in the record, were examined on the trial.

The record in this case is certified by the clerk, "as containing a transcript of all the proceedings, as well as of all the documents filed in the case." The Judge of the court, *a qua*, attests, that it "contains all the documentary evidence adduced by the parties on the trial of the cause," except the records offered in evidence, and which it was agreed should be used from a transcript already in the Supreme Court.

A certificate of the Clerk of the inferior court, which, it was also agreed, should be used as if it had been annexed to the record at the time of taking the appeal, states, that "the record contains, with the exception of the records of the suits between Kellar and Williams, before mentioned, all the evidence adduced by the parties on the trial of the exception."

C. M. Jones, for the plaintiff, moved to dismiss the appeal, on account of the imperfection of the record.

Hoffman, for the appellant. The certificate of the Clerk, filed by consent, shows that the record contains all the evidence ad-

Powell v. Williams and another.

duced on the trial of the exception. The judgment overruling that, is the only part of the case the court is asked to review. There were two distinct judgments—one on the exception, the other on the merits. The appellant contends, that there is error in the first, but does not complain of the other. Art. 898, of the Code of Practice, declares, that the Supreme Court shall exercise jurisdiction, "*in so far as it shall have knowledge of the matters argued, or contested below.*" A party may rely on an exception which he believes to have been illegally overruled, and leave his opponent to proceed on the merits.

GARLAND, J. This suit was instituted on six promissory notes, of two of which the plaintiff is the payee, and endorsee of the others. There was an exception of the pendency of the same matters in another suit, and a general denial. There was a judgment for the plaintiff, and the defendant Kellar has appealed. The appellee moves to dismiss the appeal, on the ground, that the record is imperfect, as there is no statement of facts, bill of exceptions, or assignment of errors, apparent on the face of the record, and neither the Clerk or Judge certifies, that the record contains all the evidence on which the cause was tried in the court below. The Judge certifies, that it contains all the documentary evidence, adduced by the parties. The Clerk states, that the record contains a transcript of all the proceedings, as well as of all the documents filed in the cause. These certificates are insufficient, supposing that nothing else appeared to raise a doubt upon the subject; but the record shows, that several witnesses were examined, whose evidence was not taken down. It does not appear that the defendant made any effort, by application to the opposite party, or the Judge, to obtain a statement of facts.

We have repeatedly held, that appellants must bring up complete transcripts of records, and all the evidence upon which causes were tried below, or show good cause why they have not done so. If appellants rely upon errors apparent on the face of a record, they must be pointed out in conformity to the article 897, of the Code of Practice.

Appeal dismissed.

ST. ANGE LACHOMETTE v. PIERRE FREDERIC THOMAS.

Art. 2818 of the Civil Code, which requires the contract by which a partnership in *commendam* has been created, to be recorded in the office of the Recorder of Mortgages, within six days from the time of its execution, is directory only. The omission to record the contract within that period, will not subject the partner in *commendam* absolutely to all the responsibilities of an ordinary partner towards third persons. So long as the contract is unregistered, he will be liable as an ordinary partner to the creditors of the partnership; but it is otherwise as to those who may contract with the partnership after such registry, whenever made; they being notified of the extent of his responsibility. Notice to third persons is the principal object of the registry. Art. 2819.

So, the neglect to record a judgment in the office of the Recorder of Mortgages, within ten days from the time it was rendered, as directed by the act of 26 March, 1813, does not prevent it from having the effect of a legal mortgage from the date of its registry, when made after the ten days have elapsed.

By the French law, a partner, in *commendam*, is viewed as a simple furnisher of funds, liable to the partnership, but not to third persons. The creditors have no direct action against him, in their own name, though they may compel him to pay whatever he may owe to the acting partners, by exercising the rights of the latter against him, under art. 1166 of the Code Napoleon.

After the dissolution of a partnership, none of the partners can use the social name so as to bind the rest; nor can the latter be bound by any acknowledgment of a debt, or account, so made by the others.

APPEAL from the Commercial Court of New Orleans, Watts, J.

MORPHY, J. The defendant and appellant P. F. Thomas, is sought to be made liable for \$2472 77, the balance of an account current between the plaintiff, and the late firm of Tissot & Pilloton, of which it is alleged that he was a dormant partner. The defence, besides the general issue, is, that P. F. Thomas was not a dormant partner, but a partner, in *commendam*, of the said firm, and that he is not liable to be sued in the manner and form set forth in the petition; that the partnership has been dissolved, and that a settlement was made between its members on the 26th of September, 1840; that after its dissolution, Tissot & Pilloton were without any right or power to use the social name so as to bind the defendant; that the account sued on is not due to the plaintiff; and that defendant is not bound by any approval or ac-

knowledge of its correctness, which may have been made by the said Tissot & Pilloton.

The record shows, that a notarial act of partnership was passed between Tissot & Pilloton, and Thomas, on the 12th of December, 1838, in which it was agreed, that the latter should be a partner, *in commendam*, of the firm of Tissot & Pilloton, and should furnish a sum of \$3000, which he paid, and that this act was recorded in the office of the Recorder of Mortgages ten days after its date. The appellee's counsel urges, that as the act of partnership was not recorded within six days from the date of its execution, pursuant to art. 2818 of the Civil Code, Thomas should be considered as an ordinary partner, and subject to the same responsibility as Tissot & Pilloton. That such would be the effect of an absolute want of registry clearly appears from art. 2816. The partner *in commendam*, failing to give any legal notice of the limit of his responsibility and of his participation in the profits of the concern, would be treated as a dormant partner, whose liability to third persons, when he becomes known, is co-extensive with that of the ordinary partners. The article requiring this registry within six days, is directory, and intended for the protection of the partner *in commendam*, as well as for the benefit of third persons. So long as the partner neglects to make such registry, those who become creditors of the firm have a right to treat him as an ordinary partner; but it is otherwise, we apprehend, with those who have contracted with the partnership after the recording of the act of partnership, for they were afforded the means of knowing the extent of his responsibility to them. Notice to third persons is the principal object of all laws providing for registry; and that such was the particular object of the recording required by art. 2818, appears from the succeeding article, which requires a separate book to be kept for the recording of acts of partnership, which shall be at all office hours open for the inspection of any person wishing to consult the same. Art. 2819. Thus we held, on the same principle, that the neglect to record a judgment within ten days after its rendition, under the recording act of March 26th, 1813, did not render it a nullity so as to prevent it from having the effect of a legal mortgage from the date of its registry, when recorded after the lapse of ten days. 7 La. 164. 1 Mart.

N. S. 384. As it is not pretended, that the plaintiff ever treated with the partnership before the registry made by Thomas of the act of partnership, the latter cannot be sued by him as an ordinary partner. But the appellee's counsel insists, that as it appears from the act of dissolution between the parties, that the appellant withdrew the fund he had placed in the partnership, he is in the situation of a partner *in commendam*, who has not paid in the capital he had agreed to furnish, and is, therefore, liable to be sued by the partnership creditors, to the extent of such capital.

In the jurisprudence from which we have borrowed this particular kind of partnership, the partner, *in commendam*, is viewed in the light of a simple furnisher of funds (*bailleur de fonds*), liable to the partnership, but not to third persons. It is believed that the creditors have no direct action, in their own name, against him; although they can compel him to pay whatever balance he owes to the acting partners, by exercising the rights of the latter against him, under article 1166 of the French Code. See Code de Commerce, art. 23, and Rogron's Commentaries on it. Pothier, De la Société, No. 102. Pand. Française, v. 19, p. 146. Admitting it to be otherwise under the provisions of the Louisiana Code, we are of opinion that the plaintiff has not made out his case. The only evidence he has adduced of the correctness of his account, which was specially denied by the defendant, is an approval of it, signed by Tissot & Pilloton, on the 31st of December, 1840, several months after the dissolution of the partnership.

The implied authority by which one partner binds the others during the partnership, ceases at its dissolution; and we take the rule to be now well settled, that after the dissolution of a partnership, no one of the partners is at liberty to use the social name so as to bind the others, nor are the latter bound by his acknowledgment of any debt or account. In *Hackley v. Patrick*, (3 Johnson's Rep. 536,) the court said: "After the dissolution of the partnership, the power of one party to bind the others wholly ceases. There can be no reason why his acknowledgment of an account should bind his co-partners, any more than his giving a promissory note in the name of the firm, or any other act;" and it was, therefore, held, that the plaintiff must produce further evidence of the existence of an antecedent debt, before he could recover, even

though the acknowledgment was by a partner authorized to settle all the accounts of the firm. This doctrine has been fully recognized in this, and in other states. 9 Mart. 193. 5 Ib. N. S. 324. 6 La. 683. 4 La. 31. 1 Robinson, 78. 15 Johnson, 409, 424. 7 Cowen, 650. 9 Cowen, 420. 1 Peters' Rep. 355. In the present case, no power was given to any of the partners in particular, to liquidate the affairs of the firm; they divided among themselves the property remaining, and assumed each to pay a certain proportion of the acknowledged debts; that of the plaintiff is mentioned as an unsettled account, the balance of which might be in favor of, or against the firm. When, under such circumstances, the plaintiff claims a large balance, and seeks to recover it of the partner, *in commendam*, alone, the latter has surely the right to require strict proof, and is not to be concluded by the acknowledgment of his co-partners, made long after the dissolution of the partnership.

It is, therefore, ordered, that the judgment of the Commercial Court be avoided and reversed; that there be judgment of nonsuit against the plaintiff, and that he pay the costs in both courts.

Canon, for the plaintiff.

Eyma, for the appellant.

REUBEN NICHOLS v. NATHAN NICHOLS.

Action to recover the amount of certain notes delivered to defendant for collection, with directions to apply the proceeds in a particular way, and not accounted for. Defendant having answered, that he is not indebted to plaintiff, and had been always ready to account, an interlocutory judgment was rendered, ordering him to file an account within a fixed period. No account being filed within the time, a rule to show cause why he should not be ordered to pay the amount claimed, was made absolute, and judgment rendered for the amount. On appeal; *held*, that the judgment should be affirmed.

APPEAL from the District Court of the First District, *Buchanan, J.*

Robinson, for the plaintiff.

Randall and Hoffman, for the appellant.

BULLARD, J. The plaintiff alleges, that the defendant received from him a number of notes, under an agreement to collect the same, and to apply the proceeds to the payment of the plaintiff's debts; but that he has converted the same to his own use; and, although often demanded, refuses to account either for the notes or the money. He, therefore, prays for judgment for the amount of said notes.

The defendant, after filing an exception which was overruled, answered that he was not in any manner indebted to the plaintiff, and that he has no right of action against him; denying that the plaintiff had ever demanded a settlement of accounts of him, as agent; and averring, that he has always been ready to render such account. He further answers, that if the plaintiff ever had any claim against him, as alleged, he has lost the same by bringing suits against him in the District Court and in the City Court, since the agency of the defendant has been cancelled, in which suits he did not include the present claim, whereby the same was extinguished.

The court rendered an interlocutory judgment, ordering the defendant, within ten days, to render an account of the moneys received by him, and paid by him on account of the plaintiff. This judgment having been notified to the defendant, on the 2d of April, and no account having been filed in obedience thereto, the plaintiff, on the 4th of May, took a rule on the defendant to show cause why he should not be ordered to pay the amount claimed, on the ground, that he had neglected to file an account within the time allowed by the court.

No cause being shown at the time appointed, the rule was made absolute, and judgment was rendered against the defendant for the amount claimed in the petition.

A motion was made for a new trial, and overruled; but, as it has not been insisted upon in this court, that the court erred in overruling the motion, we forbear to notice it any further.

We see no error in the proceedings, or judgment rendered in this case. The defendant had a fair opportunity to render an account, after the interlocutory judgment was given. Having failed to comply with that judgment, it was, in our opinion, regular to proceed to final judgment. The plaintiff, surely, was not obliged

Castaing v. The New Orleans Improvement and Banking Company and others.

to institute a new suit. The execution of the receipt sued upon was admitted by the pleadings.

Judgment affirmed.

FRANÇOIS CASTAING v. THE NEW ORLEANS IMPROVEMENT
AND BANKING COMPANY and others.

Action by a tenant against his lessors, for damages for a disturbance, in his enjoyment of the premises; defendants excepted to the petition, denying any disturbance, but averring if there had been any, it did not proceed from them, or from those over whom they had any control, or for whose acts they could be held responsible. The exception having been sustained below, and the suit dismissed, in an appeal by plaintiff: *Held*, that the plea of defendants was rather an answer to the merits, than an exception, and that the court erred in dismissing the suit, without a trial on the issues made up between the parties.

APPEAL from the District Court of the First District, *Buchanan, J.*

BULLARD, J.* The plaintiff represents, that he acquired by lease from the Improvement Bank, the right to receive taxes upon all auction sales made in the Rotunda of the City Exchange, during fifteen months. That in the lease, the following existing regulations, established by the Bank, were incorporated, to wit: 1st. The Rotunda shall be open for business every day from eleven o'clock, until three in the afternoon, Sundays and holidays only excepted. 2d. Auctions shall be made on the *tribunes* or *rostra* established for that purpose in the Rotunda. He complains, that Ducros, Sheriff, had made an auction sale in the Coffee House, or vestibule of the St. Louis Exchange, a part of the same edifice leased to Alvarez; that he has thus been disturbed in the enjoyment of the property leased to him; and he sues the Bank, Ducros, and Alvarez for damages, which he lays at two thousand dollars each.

* MORPHY, J., being interested in the question, did not sit on the trial of this case.

Castaing v. The New Orleans Improvement and Banking Company and others.

It is not necessary to inquire into the defence set up by Ducros and Alvarez, because this is an appeal by the plaintiff from a judgment of the District Court, sustaining what is called an exception of the Bank. The substance of the answer of the Bank is, that the plaintiff has no right of action against them, not having suffered any disturbance, *either in fact, or law*, in the possession of all the rights and privileges enumerated in the lease; and of the right of receiving the taxes on the public sales made in the Rotunda: and that, he has never ceased to be in peaceful possession of the same. They further allege, that if said Castaing had really suffered any disturbance in the possession of said rights and privileges, it is not by the act of the Bank; and they cannot be made responsible for all the acts of the persons over whom they have no power nor control.

This appears to us rather an answer to the merits, than an exception. If it had been overruled, it is not easy to imagine what further answer could have been made by the Bank. All the facts are denied, except the lease. The alleged disturbance is denied, either in law or fact; and it is expressly averred, that the plaintiff has never ceased to enjoy all the rights and privileges conferred upon him by his lease. If the Bank had simply averred, that the facts set forth in the petition did not amount to such a disturbance as the lessor had warranted against, and that it did not disclose a legal cause of action against the Bank, it would have been properly an exception; and if overruled, the defendant might have answered afterwards to the merits. Without expressing any opinion, therefore, upon the questions presented by the pleadings, we are of opinion, that the court erred in dismissing the suit, without a trial upon the issues made up between the parties.

The judgment of the District Court is, therefore, reversed, and it is ordered, that the case be remanded for further proceedings according to law; the costs of the appeal to be paid by the appellee.

Deslex, for the appellant.

Marsoudet, for the defendants.

STEPHEN EMILE PERCY v. ARTHUR PEYROUX.

Where the object of an action is to establish that defendant, a builder, has been paid for the work done by him under a contract with plaintiff, and to procure its erasure from the books of the Recorder of Mortgages, defendant may claim in reconvention a balance due to him, under another contract, for buildings and materials constructed on the same lot.

The owner of a building will be responsible for extra work done on it, though it be not proved that he ordered it, where it is shown, that he was at the building daily and must have seen it, and did not forbid it. If he did not want the work done, he should have prevented its execution.

A contractor who fails to complete a building within the time specified, will be responsible to the owner for the damage sustained by his failure to comply with his contract.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*

GARLAND, J. The plaintiff represents, that he and one Theodore Durel contracted with the defendant, to erect a dwelling house of brick, and some out-houses, according to a plan prepared by an architect, for which they were to pay \$4350, at certain periods. The house was to be completed during the month of May, 1840. The petition alleges, that the house was not completed in the month of May, 1840; that the work done by the defendant was not executed in a workmanlike manner; that the plaintiff had been compelled to employ other workmen to complete it, at an expense of \$500, exceeding the contract price; and that the defendant had received more than the work executed by him was worth. The plaintiff further represents, that notwithstanding these violations of his engagements, the defendant has had the contract in relation to the erection of the buildings recorded in the office of the Register of Mortgages, thereby creating a lien on the premises, and refuses to release it, although he well knows that nothing is due to him. The plaintiff alleges, that he has purchased all the rights of Durel to the property, and is seriously injured by the existence of this pretended mortgage; wherefore he prays, that the same may be cancelled and erased, and for general relief in the premises.

The defendant admits the execution of the contract, and the recording thereof, which he avers was necessary to preserve his

legal rights. He alleges, that the plaintiff and Durel are indebted to him, *in solido*, in the sum of \$1275 03, with legal interest, for work and labor, on the buildings mentioned in the petition, for which he has a privilege on the property, and also for work on other buildings erected on the same lot, under another contract, and for lumber furnished, and for extra work not mentioned in the contract, but done for and at the request of said Percy and Durel. He, therefore, prays that Durel may be made a party to the suit; that the answer may be served on him and Percy; and that judgment may be given on his demand in reconvention, against them for the sum claimed, with the privilege allowed by law. To this reconventional demand, Percy and Durel answered, that they were not indebted to the defendant, but that he is indebted to them, in the sum of \$581 44, on an account stated, for which they prayed for judgment, in addition to the prayer of their original petition. The inferior court, after a long investigation and review of the evidence, gave a judgment in favor of Peyroux, the defendant, for \$562 98, upon the payment of which, he is directed to release the mortgage on the property mentioned. From this judgment the plaintiff has appealed; and in this court the appellee asks for an amendment of the judgment in his favor, alleging that he is entitled to more than is allowed.

Our attention is first called to the exception of the plaintiff, that the demand in reconvention ought not to be allowed, as it is not incidental to, and connected with the original demand. We think the Judge did not err, in overruling the exception. The object of the suit was to show, that the defendant had been paid for his work, and that the contract had been discharged; it was competent for the latter to show the contrary; and, if he could, that a balance was still owing to him. All the matters in contest arise out of the construction of the buildings on the same lot, and specified in the contracts.

The plaintiff complains of an allowance of \$123 50, for an additional room and gallery to the kitchen, for weather boarding the whole, and for a window and painting. The price of the building is not unreasonable. One witness says that the weather boarding was worth \$30, and another \$40. The Judge below saw and heard the witnesses testify, and we cannot say that he erred in

Percy v. Peyroux.

allowing the largest amount. The plaintiff is clearly bound to pay for the window, and the painting of the house. Admitting that he did not order it to be done, it is proved, that he was daily at the place, and must have seen it; and as he did not forbid the defendant from doing this work, he is bound to pay for it, as he is not entitled to enrich himself at the defendant's expense. If he did not want the work done, he should have prevented it.

The plaintiff further complains of the allowance of \$200 for making the walls of the house twelve inches thick, instead of eight, as specified in the contract; and of \$120 for making the partition walls of brick, instead of being studding, and lathed and plastered. A witness testifies to the value of these alterations in the plan, and he is not contradicted. Had the difference in cost not been so much, it would have been easy for the plaintiff to have procured some evidence on the subject. He had the house examined by an architect, and no questions were asked him as to the difference in cost.

For the reasons stated in relation to the painting, and the window in the kitchen, we think the plaintiff bound to pay for painting the stable, for the copper guards, for the dormant windows, and the difference in value in the gallery posts.

The next ground of complaint is, that only \$150 is allowed to the plaintiff, for having the house finished, after the defendant quitted working on it. The evidence does not show how much the plaintiff paid for finishing the building, which he might have shown, we suppose. He relies upon the testimony of Cazanova, an architect, who says it would cost four or five hundred dollars to finish it. This is very vague, and shows that no calculation was made of the cost, or of what was paid; and the witness subsequently says, that he does not mean that it would cost that sum to finish it according to the plan. We, therefore, infer, that he meant it would cost that amount to complete it in the manner he supposed it ought to have been finished. The testimony does not authorize us to say that the Judge erred. The plaintiff having neglected to show what the work actually cost, must abide by the testimony as it is.

The last ground of complaint is, that the court only allowed the plaintiff rent for one month, when it ought to have allowed for

Palmer and another v. Day.

four months. The contract was, that the house should be finished and delivered during all the month of May, at the latest. It was not completed, when the plaintiff took possession about the last of September, making four months, during which time, the plaintiff had to pay rent for a house in the city. It is in evidence, that Percy and Durel were to furnish a quantity of materials, which in consequence of the bad condition of the road to the Bayou St. John, could not be delivered for two or three months in the spring. This probably delayed the completion of the buildings for that space of time. In June or July, the plaintiff complained of the delay and negligence of the defendant, and threatened to sue him for damages. The defendant then promised that he would pay rent until the house was finished. The period of this promise is not definitely shown; nor is the exact time established during which the defendant was delayed by the failure to deliver the materials. We, therefore, think it just to allow the plaintiff rent for one month more than the inferior court has allowed, which is sixty-two dollars and fifty cents.

The judgment of the Commercial Court, deducting therefrom the sum of sixty-two dollars and fifty cents, is affirmed; the defendant and appellee paying the costs of the appeal.

Blache, for the appellant.

Barthe, for the defendant.

GEORGE PALMER and another v. HENRY R. DAY.

Plaintiffs having instituted suit on a note, a creditor of theirs had a *f. fa.* levied on it, when it was agreed by the parties, that the note should be delivered to him. The note, while yet in the hands of the clerk, was attached by certain persons who had commenced an action against the seizing creditor. On a rule taken by the latter, the court ordered the note to be delivered to him, and from this judgment the attaching parties appealed. Pending the appeal, the action commenced by them against the seizing creditor, was decided against them: *Held*, that being thus without interest, the appeal must be dismissed.

APPEAL from the Commercial Court of New Orleans, *Watts*, J.

Palmer and another v. Day.

L. C. Duncan, for the appellants.

Durell, contra.

GARLAND, J. Palmer & Whiting instituted a suit on a promissory note against Day, pending which, Scott, who had a judgment against them, had an execution levied on it. All parties then agreed, that Scott should take the note, and enter a credit for the amount on his judgment. The note was on file in court, and when the counsel for Scott applied for it, the clerk refused to deliver it, alleging, that A. & G. H. Wellington had filed a suit and writ of attachment against Scott, and that their counsel had instructed him (the clerk) not to give up the note, although the process had not been issued. The counsel of Scott then moved for a rule on Palmer & Whiting, Day, and A. & G. H. Wellington, to show cause, why the note should not be delivered to him, in conformity with the agreement. After hearing the parties, the court ordered the note to be delivered to Scott, from which judgment A. & G. H. Wellington have appealed.

The record shows, that the appellants failed in their suit against Scott; (vide case of *Wellington and another v. Scott*, decided in April, 1842; 2 Robinson, 59;) consequently, they have no claim on the note, or interest in it. The record does not show the amount in contest, but if we were to judge from the petition of appeal and bond, it would appear to be less than three hundred dollars.

The case is evidently a fancy one, prosecuted for the purpose of having a difference of opinion between counsel decided. The appellant has no interest, admitting we have jurisdiction.

Appeal dismissed.

JOHN RILEY v. THE CITY OF LOUISVILLE.

In an action against defendants, for damages on account of an injury done to plaintiff's boat by a steamer alleged to belong to the former, who pleaded the general issue, proof that defendants were owners of the steamer, is necessary to a recovery; and where the omission of evidence of ownership was attributable to the oversight of the plaintiff's attorney, the case will be remanded to obtain such proof.

APPEAL from the District Court of the First District, *Buchanan, J.*

MARTIN, J. The defendants are appellants from a judgment by which they are condemned to pay six hundred dollars, for damages sustained by the plaintiff's steamboat, through the unskillfulness and negligence of the persons who navigated that of the defendants. The suit began by a process of attachment, which was levied on the steamboat Agnes, which the petition alleges to be the property of the defendants, and the boat by which that of the plaintiff was injured. She was released on a bond, given by two individuals. One of whom states himself to be the master of the steamboat Agnes. The answer begins by the general issue; but no part of it admits, that the steamer Agnes is their property. The legal proof of that property, is essential to the plaintiff's recovery. The moral proof is strong. The Sheriff who was directed to attach the defendant's property, has reported, that he seized the steamboat Agnes, which was released on the application of the master, who gave his bond to pay whatever judgment might be obtained in the present suit. The ownership, the denial of which, supported by evidence, would have been the best defence that could have been made for the defendants, was not denied otherwise than by the general issue. These circumstances compel us to consider this case as one of those which justice requires us to remand, in order, that evidence, which most probably exists, may be procured, the absence of which can only be attributed to an oversight in the plaintiff's attorney.

It is, therefore, ordered and decreed, that the judgment be annulled and reversed, and the case remanded for further pro-

ceedings according to law ; the plaintiff paying the costs of the appeal.

Randall, for the plaintiffs.

Chinn, for the appellants.

AMELIE LEFRANÇOIS V. JACQUES CHARBONNET.

A tutress, employed for a term of years, at a yearly salary, who leaves her employer before the expiration of the term, on account of his failure to pay her salary either quarterly or annually, will not thereby forfeit the amount already due. The defendant's failure to pay released her from her contract.

APPEAL from the District Court of the First District, *Buchanan*, J.

MORPHY, J. The petitioner claims \$831 37, as a balance due for her services as a teacher of the defendant's children, from the 23d of February, 1839, to the 24th of October, 1840, at the rate of \$800 per annum. The defendant avers, that he engaged the petitioner as a teacher, at the yearly salary of \$800, for the term of three years, to be computed from the 23d of February, 1839 ; and that it was agreed and understood, that she should teach six children for the aforesaid salary, and that she was to have her boarding and lodging at his house during all this time ; but that, in violation of her contract, the petitioner refused to instruct the number of children agreed upon, and left the house and employment of the defendant before the expiration of the term above stated, without any legal or reasonable cause, and without his knowledge and consent ; that by such a violation of her contract, the plaintiff has lost and forfeited any claim for services she might otherwise have ; and that the amount paid was an ample compensation for the services she actually rendered. The plaintiff had a verdict and judgment below in her favor, and the defendant appealed. The testimony, in our opinion, fully supports the verdict. By leaving the defendant's house before the expiration of the three years she had agreed to stay, the plaintiff did

not forfeit her salary. The defendant's failure to pay her, either quarterly, or by the year, released her from the contract. After giving defendant notice, that she could remain no longer unless paid, she left his house, and brought the present suit. This she had clearly a right to do. As to the alleged refusal of the plaintiff to instruct six children at the defendant's house, pursuant to her agreement, the testimony shows, that a few weeks after she commenced teaching defendant's children, who were three in number, she refused to take charge of a child of Volant Labarre. From the testimony of one of the defendant's own witnesses, the agreement appears to have been, that the six children, to whose tuition the plaintiff was to attend, should be taken from the family of defendant, to whom Volant Labarre is in no wise related. No other child was ever offered to be put under the plaintiff's care; and, in a correspondence which took place between the plaintiff and the defendant, the latter frequently deplores his inability to pay her salary, but makes no complaint whatever of any breach of contract on her part. There is, however, in the verdict, a small error which must be corrected. In the plaintiff's account, annexed to her petition, the defendant is credited on the 2d of May, 1840, only with \$300, when by a receipt, which we find in the record, he appears, on that day, to have paid plaintiff \$361 63.

It is, therefore, ordered and decreed, that the judgment of the District Court be so amended, that the plaintiff do recover of the defendant only the sum of seven hundred and sixty-nine dollars and seventy-four cents, with costs below; those of this appeal to be borne by her.

Castera, for the plaintiff.

Roselius, for the appellant.

The Mechanics and Traders Bank of New Orleans v. Monsarrat and others.

THE MECHANICS AND TRADERS BANK OF NEW ORLEANS v.
LEONARD MONSARRAT and others.

APPEAL from the District Court of the First District, *Buchanan, J.*

Sterrett, for the appellants.

Soulé, contra.

MORPHY, J. Leonard Monsarrat as principal, and Jean Lacoste and Auguste O'Duhigg as his sureties, are sued on a bond, whereby they bound themselves, jointly and severally, unto the petitioners, in the sum of \$15,000, that said Monsarrat should well and truly and faithfully do and perform, all and singular the duties of the office of paying and receiving teller, in the Mechanics and Traders Bank; that he should render a faithful account of all moneys and effects committed to his charge, or under his control; and, generally, should save the Bank harmless, for or on account of any negligence or misconduct of the said Monsarrat. It is charged, that, owing to the gross and culpable neglect and misconduct of the latter, the petitioners have suffered a loss of \$12,760 04; this amount having been paid by him, without authority, out of the funds of the Bank, on or about the 18th of March, 1840, on the checks of a certain S. W. Wolcott, when he had no funds in the Bank. The defendant, Monsarrat, pleaded the general issue, admitting, however, the alleged overdraft, but denying his liability therefor. He averred, that the nature of the mandate entrusted to him by the Bank, was not such as to impose any absolute obligation, whereby the mere fact of his paying, on presentation, any check drawn by a customer of the Bank, could make him responsible for any amount which might have been thus overdrawn, unless it should appear, that there was either gross negligence on his part, or an actual connivance with the person or persons practicing such frauds on the Bank; that a correct and strict performance of the duties attached to the office he held in the Bank, could not depend on his ability, skill, and prudence alone, but was, and necessarily has been, subservient to the faithful discharge of the relative duties imposed on other clerks,

The Mechanics and Traders Bank of New Orleans v. Monsarrat and others.

and without which his utmost exertions and punctuality could be of no avail. The defendant further averred, that in the present case, he was deprived of the means whereby, in every well regulated Bank, he could have been enabled to discover the fraud committed on the plaintiffs, soon enough to prevent its reaching any considerable amount; that the overdraft was effected by means of several checks, all presented on the same day, the first ones of which were for a comparatively small sum; that being drawn on a large account, generally regular and correct, the said checks must have been, and actually were, presumed not to overdraw the balance of funds belonging to the drawer; and, finally, that the payments made on the overdraft of the said S. W. Wolcott, cannot be attributed to his fault or neglect, but were the result of an error which he could not have suspected or discovered, and for which he cannot be held liable.

The other defendants prayedoyer of certain books and papers; whereupon, by consent, the cause was tried, and submitted to a jury, as against Monsarrat alone. He having had a verdict and judgment below in his favor, the petitioners appealed, after vainly endeavoring to obtain a new trial.

The question presented by the issue joined was one of fact, to wit; whether there had been negligence on the part of defendant in the discharge of his duties to the plaintiffs. A great deal of evidence was adduced on the trial, showing the respective duties of the paying teller and book-keeper of a Bank; the extreme difficulty of avoiding errors when the offices of paying and receiving teller are united in the same person; the cases in which it is the duty of the paying teller to inquire of the book-keeper, whether the drawer of a check has funds to meet it; the well established usage in all Banks of paying checks, without inquiry, when the drawer keeps a good and regular account, and there is no room for suspicion; the assistance which the book-keeper of a bank is bound to afford the paying teller, by advising him, from time to time, of the state of such accounts as are suspicious, or overdrawn, &c.

The jury, who heard all the testimony, and applied it to the circumstances of this case, came to a conclusion, which we do not

Fortier v. Zimpel.

feel ourselves authorized to say, is so clearly erroneous as to make it our duty to set aside their verdict.

Judgment affirmed.

CHARLES FORTIER v. CHARLES FREDERCK ZIMPEL.

An opposition, by a mortgage creditor, to the homologation of a Sheriff's sale was dismissed, though no proof had been adduced of the publication of the monition. The monition, being subsequently published, and proved, a judgment of homologation was rendered. The opponent, having appealed from the judgment of dismissal, *Held*, that being an hypothecary creditor, the appellant had sufficient interest to make opposition; that the court erred in dismissing his opposition, without evidence that the monition had been published; and that the judgment of homologation subsequently rendered cannot prejudice him, though it may be conclusive as to others.

APPEAL from the District Court of the First District, *Buchanan, J.*

BULLARD, J. This is an appeal from a judgment of the District Court, dismissing the opposition of John Slidell, to the homologation of a Sheriff's sale, upon a monition, the opponent being a mortgage creditor of Zimpel, the former owner. The grounds of opposition were, that the order of seizure was issued improvidently, without due evidence, or a proper party defendant; that the forms of law, as to appraisement, seizure, notices, advertisement and sale, were not fulfilled; and that the monition was not duly obtained, and had not been regularly advertised.

The record shows, that no proof was made of the publication of the monition, before the dismissal of the opposition of Slidell, and that long afterwards, upon the publication being shown, the sale was homologated.* The court, in our opinion, erred in dis-

* The judgment dismissing the opposition was signed 1 March, 1841. On the 4th of August following, a witness proved, that the advertisements had been made in the months of May, and June preceding.

Hallock and others v. Caruthers and others.

missing the opposition, without being first satisfied, that the motion had been published. Slidell showing himself to be an hypothecary creditor of Zimpel, had a sufficient interest to make opposition ; and one of the grounds of opposition was, that there had been no publication. The judgment of homologation afterwards rendered, cannot prejudice him, although it may be conclusive as to all other persons.

It is, therefore, ordered and decreed, that the judgment of the District Court, dismissing the opposition of John Slidell, be reversed, and that the case be remanded for further proceedings according to law ; the plaintiff paying the costs of this appeal.

Labarre and Derbigny, for the plaintiff.

T. Slidell, for the appellant.

CHARLES HALLOCK and others v. MARTIN CARUTHERS and others.

Service of interrogatories to be propounded to a witness under a commission, may be either on the adverse party, or his counsel. No written notification to either is required. C. P. 426. Act 25th March, 1828, chap. 83, § 7.

APPEAL from the Parish Court of New Orleans, *Maurian, J.*

MARTIN, J. The plaintiffs and appellants have placed this case before us on a bill of exceptions to the opinion of the court, rejecting the deposition of witnesses taken under a commission, on the ground that the interrogatories had been served on the defendants.

Our learned brother in the Parish Court was of opinion, that such a service was not the proper one, and ought to have been made on the attorney of the defendants. In support of this proposition, he urged :

1st. That the defendants had an attorney on record.

2d. That the invariable practice is, to communicate the interrogatories to the attorney of the adverse party.

3d. That no instance is recollected of a contrary practice ; that the court appealed to all the gentlemen of the bar present,

and, among them, to the counsel of the plaintiff; and that none of them could state any instance of a contrary practice.

4th. That the Code of Practice, art. 438, seems to contemplate a *communication to the attorney* or a *notification to the party*; and that, if a notification to the party is now relied on, a written one ought to have been shown, for a notification is essentially written. Civil Code, art. 3522, No. 23.

5th. That courts of justice must discountenance any practice which might surprise the adverse party.

6th. That the plaintiffs refused a continuance offered them by the court.

The counsel for the appellants has drawn our attention to the Code of Practice, which required interrogatories to be served on the adverse party. Art. 426. The act of 25th March, 1828, authorizes them to be served on the *adverse party, or his or their counsel*.

In our opinion, the Judge erred. The Code of Practice, and the Act of 1828, by which it was amended, authorize the service of interrogatories on the adverse party. The opinion of the Parish Court assumes, that the law may be controlled by the practice of the members of the bar; this it is impossible for us to admit.

It is, therefore, ordered and decreed, that the judgment be annulled and reversed, the nonsuit set aside, and the case remanded for further proceedings, with directions to the Judge to admit the depositions rejected, if there be no other ground of opposition thereto, than the service of the interrogatories on the defendants, they paying the costs of this appeal.

Durrell, for the appellants.

L. C. Duncan, for the defendants.

JACOB CLINES v. ROSWELL R. FRISBEE, Captain and Owner of the Steamer John H. Bills.

The owner of a steamer, as a common carrier, is responsible for property received on his boat, and lost by his fault.

Interest is due, from judicial demand, on an amount recovered as damages for property lost by a common carrier. The sum claimed arises out of a contract, though the amount due was unliquidated.

APPEAL from the Commercial Court of New Orleans, *Watts, J. C. M. Jones*, for the plaintiff.

A. Hennen, for the appellant.

BULLARD, J. The plaintiff seeks to recover of the defendant, as captain and part owner of a steamboat, the value of several horses, which he alleges the defendant undertook to convey from Portland in Kentucky, to Grand Gulf, but which were drowned by the fault of the defendant. There was judgment for the plaintiff, and the defendant has appealed.

It appears that the horses were put on board the hulk of an old steamboat called the Buffalo, which was lashed along side of, and towed by the boat commanded by the defendant. That some of the stanchions which supported the cabin of the Buffalo, had been cut away, and that the accident happened in consequence of taking on board so large a quantity of corn in sacks, as to crush the cabin, and thereby kill a number of horses which were on the deck beneath. Two stanchions near the bow, and two near the stern, had been cut away before going over the falls of the Ohio. When the corn was being put in the cabin of the Buffalo, the mate was notified, that the cabin was about giving way, and he replied, that the carpenter would put props under it. Nothing, however, was done.

The evidence satisfied the court, that the loss of the horses was occasioned by the fault of the defendant, and we cannot say it erred.

But it is contended by the defendant, that the court erred, in not allowing for the freight of the horses. The defendant was

Marty v. His Creditors.

entitled to be paid the freight of such of his horses as were delivered safe at Grand Gulf; but it is not shown, that it was not allowed in the judgment, which is for \$598, and the Judge does not state by what calculation he reached that result. The evidence would justify a judgment for that amount, after deducting the freight for the horses and carriage, delivered according to the contract.

It is next contended, that the plaintiff is not entitled to interest from the rendition of the judgment, and that, in this respect, it is erroneous. The sum claimed arises out of a contract, and although the amount was not liquidated, interest was due from judicial demand; and the defendant cannot complain, that it has been allowed only from judgment rendered.

RODOLPHE MARTY v. HIS CREDITORS.

In general, where joint obligors or creditors unite in a common acquittance, each will be presumed to have received his share, according to the contract. Each stipulates only for himself.

APPEAL from the Parish Court of New Orleans, *Maurian, J.*

BULLARD, J. The syndic of the insolvent having filed his tableau of distribution, sundry oppositions were made to it, one of which only it is necessary to notice; inasmuch, as this is an appeal on the part of the syndic and the liquidators of the Improvement Bank, from a judgment of the Parish Court sustaining that opposition. It is that of J. Severin Marty, son of the insolvent, who claims to be put down as an hypothecary creditor, for a large sum, coming to him as one of the heirs of his mother, who was in community with the insolvent, while he was a minor, and for which he is still accountable. He specifies his claims, as follows: 1st. One-sixth of the slaves sold to Lombard & Cochoy, October 11th, 1838, \$2,333 33. 2d. One-sixth of the interest received on same, \$121 32. 3d. One-sixth of the amount of gold kept in the *armoire* of the deceased, locked up in a tin box,

\$980. There are other items which have not been objected to. The contest in this court has turned principally upon the sums received from Lombard & Cochoy.

In order properly to understand this part of the case, it is necessary to premise, that after the death of Mrs. Marty, and while Joseph Severin Marty was yet a minor, his father, brother, and sister, entered into a contract with Lombard & Cochoy, the substance of which is as follows:—Marty, *père*, J. B. Marty, and Elizabeth Marty, acting in their own right, and assuming to act for the minor Severin, for whom they engage themselves, (*se portent forts*,) sell to Lombard & Cochoy, the stock and furniture of an hotel, (*fond d'hotel garni*,) commonly called the *Hotel des Etrangers*, together with fourteen slaves, who are named. Marty, *père*, is declared to be the owner of one undivided half, and that the other half belonged to three of the children of the deceased Mrs. Marty, two of whom were parties to the act, and, together with their father, bind themselves, *in solido*, that the minor heir will ratify the act. The price of the property sold, is declared to be \$20,923 32, of which the whole was paid, except \$5,231, which the purchasers engage to pay in fifteen months, provided that the said minor, Joseph Severin Marty, having been rendered capable of contracting as a major, &c., shall have ratified purely and simply the present contract; it being well understood that the sum shall not be exigible until this sale shall have been ratified by the minor, having capacity to make a valid ratification. The balance was to bear interest at ten per cent.

In the following year, (1839,) J. Severin Marty having been duly emancipated, appeared before a notary public and two witnesses, and declared, that having been made acquainted with the contract above mentioned, he ratified and confirmed it in all its parts and clauses. The act then proceeds to recite, that, in consequence of this ratification, Lombard for himself and Cochoy, paid down, in presence of the notary and witnesses, to the said Rodolphe Marty, J. B. Marty, Elizabeth Marty, and J. Severin Marty: 1st, the sum of \$5231, being the balance due for the price of the slaves sold to them, and which they were not to pay until the act of sale should have been ratified by J. Severin Marty. And, 2d, the sum of \$629 16 interest upon the same, for which

Marty v. His Creditors.

sums, amounting to \$5860 16, the parties above mentioned, gave a final discharge and release of mortgage. It would appear from the copy of this act in the record, that Marty, *père*, did not sign the original. It purports to be signed only by the three children. The case has been argued, however, as if it had been signed by all the parties named, and may so be considered by us.

It is contended, on the part of the syndic and of the bank, that the ratification and receipt of J. Severin Marty, prove that he had received all that was coming to him from his mother's estate, or all his interest in the property sold to Lombard & Cochoy. It is urged, on the other hand, that the receipt does not show that he received more than his virile share of the sum last paid, that is to say, one-sixth, or one-fourth, of the sum of \$5860, and that the balance is still in the hands of his father, and ought to be paid out of his estate in the hands of the syndic of his creditors.

In order to solve this difficulty, it is necessary to premise, that more than the sixth part, coming to J. Severin Marty, was left in the hands of the purchasers, not to be paid until the contract entered into by his father, brother, and sister should be unconditionally ratified. It is an undisputed principle of our code, that the sale of another's property is null. Now, although the father, brother, and sister, had assumed to represent J. Severin Marty, and bound themselves, *in solido*, that he would ratify their act; yet it did not amount to a sale of his undivided interest in the property. His title was not divested. That being the case, we cannot assume that any part of the price of Severin's share was paid. On the contrary, we are authorized to conclude that the whole remained in the hands of the purchasers, subject to his final ratification of the contract in his name. It appears to us logical to conclude from these premises, that when afterwards, the father and his three children united in a receipt to the purchasers, for the balance left in their hands, each received what he was entitled to. In general, where joint obligees or creditors unite in a common acquittance, each is presumed to have received his share according to the contract. Each one stipulates only for himself. There is no more reason for supposing that the father received any part of what was coming to Severin, than that his sister did. He was no longer under his father's control, in relation to his

Levistones v. Claiborne, Marshal, and another.

contracts, and must be presumed to have acted for himself, and to have received all he had a right to receive.

With respect to the opponent's share of the gold found in a tin box, the court below was satisfied with the proof, and no attempt has been made to discredit the witnesses, by whom its existence and amount were established. No objection has been made to the claim for a part of the price of the three slaves. We conclude that the court erred, in allowing to J. Severin Marty, one-sixth of the price of the furniture and slaves sold to Lombard & Cochoy, and the item of interest.

It is therefore adjudged and decreed, that the judgment of the Parish Court be reversed, so far as it allows to J. Severin Marty, the three items set forth in the judgment, of \$2333 33, \$1153 88 and of \$121 32, and that it be affirmed in all other respects; and that the tableau thus reformed, be homologated and approved. The costs of the appeal to be paid by J. Severin Marty.

MarsouDET, for the appellants.

Soulé, contra.

CHARLES LEVISTONES v. CHARLES CLAIBORNE, Marshal, and another.

Where one against whom a *fi. fa.* has been issued, hands to the officer about to make a seizure, certain notes, circulating as currency, in the presence of a third person, who asserts that he is the owner of them, but does not insist on the officer's desisting from taking them away, he will forfeit any claim he may have to them.

APPEAL from the City Court of New Orleans, Collens, J. The petition alleges, that Claiborne, as Marshal of the City Court, had wrongfully seized, under a *fi. fa.* issued at the suit of his co-defendant Whiting, against one Gottschalk, five post notes of \$100 each, issued by one of the municipalities of the city of New Orleans; that the notes are the property of the petitioner, who had, some months before the seizure, furnished Gottschalk with certain bank and municipality notes, and other money, to be employed by the latter on the petitioner's account and at his

Levistones v. Claiborne, Marshal, and another.

risk, in the business of money brokerage ; that Gottschalk was allowed, as compensation for his services, half the profits, which were settled up daily ; and that all the notes, coin, or other money in Gottschalk's possession at the time of the seizure, belonged to the petitioner. It was further alleged that the Marshal, though requested so to do, refused to give back the notes so seized. An injunction was prayed for, and a judgment for the notes. The answer denied the allegations of the petition generally, and averred, that the notes were paid to the Marshal to satisfy a *fi. fa.* issued by Whiting against Gottschalk, to whom the notes belonged.

Ezekiel, a clerk employed in the office kept by Gottschalk, testified that the latter kept an office " for account of the plaintiff ;" that the business carried on for Levistones is that of an exchange broker, and that Gottschalk is engaged in a stock and note business for himself ; that the money in the office belongs to Levistones ; that he was in the office at the time of the seizure, and that the post notes taken by the Marshal belonged to Levistones ; that Gottschalk received a compensation for his services, settling with Levistones generally every week ; that he did not share with Levistones his profits as a broker, in stocks and notes ; that Gottschalk had no interest in the business ; that when the Marshal came into the office he attempted to seize the money on the counter ; that Gottschalk told him it did not belong to him, when he answered that he had orders to seize the money, and should do it ; that Gottschalk then asked the plaintiff if he should point out the money to be seized, and, on his consenting, Gottschalk pointed out the municipality post notes ; that plaintiff told the officer that the money belonged to him ; that the office furniture belonged to Levistones ; that he does not know who leased the office, but knows that Gottschalk pays the rent out of plaintiff's money. Gottschalk's name is on the door ; that all the money in the office on the day of the seizure belonged to Levistones ; and that the witness looks to him for his salary.

Goodman testified, that during the sickness of the first witness, he had discharged his duties as a clerk, and that from his knowledge of the books of the office, he is certain that the capital belonged to the plaintiff.

Levistones v. Claiborne, Marshal, and another.

Rochebrun deposed, that he was present when the seizure was made ; that when the Marshal informed Gottschalk that he was about to seize, the latter answered that the contents of the office belonged to Levistones, who, at that time, entered the office ; that the Marshal having seized all the money, Gottschalk told him there was more than enough in the office to satisfy the claim ; and, after speaking with plaintiff, delivered to the officer a quantity of municipality post notes.

Crozat, the Deputy Marshal by whom the seizure was made, testified, that on entering the office and informing Gottschalk of his orders to seize, the latter told him that he had no property ; that on looking towards the bank notes on the counter, Gottschalk told him not to seize them, as they were not his ; that he then told Gottschalk that he had orders to seize, and should do so ; that Gottschalk then spoke a few words with plaintiff, and delivered to the witness the municipality post notes ; that plaintiff told witness that the money seized was his ; that Gottschalk whispered in plaintiff's ear both before and after the delivery of the money ; that he, (witness,) did not count the money in the office, but thinks there was between \$5000 and \$7000 in bank and municipality notes at their nominal value, besides the gold and silver on the counter ; that Levistones did not speak to witness before Gottschalk had delivered the money to him ; that, before the money was so delivered to him, Levistones spoke aloud, but witness did not listen to him ; and that Levistones appeared to be angry.

Fellows, a witness for the defendant, stated that Gottschalk's office was next door to his own ; that Gottschalk's name is on the door, and that the business of the office was done by him ; that in the beginning of the last summer, Gottschalk told him he was about to form a partnership ; that, sometime after, he told witness that he had formed a partnership with the plaintiff, who was to advance the capital, and he, Gottschalk, was to do the business ; that Gottschalk removed to the office in which the seizure was made, immediately after telling witness that he had formed a partnership with Levistones ; that it was not publicly known that Levistones had advanced the capital, and the communication to

Levistones v. Claiborne, Marshal, and another.

witness was a confidential one ; that he has seen plaintiff in the office every day ; knows Gottschalk to be needy.

Goodman, in answer to a question by the court, stated, that the municipality, bank, and uncurrent notes, and specie in the office at the time of the seizure, were worth from \$3500 to \$4000.

On this evidence, there was a judgment in favor of the plaintiff, ordering the return of the notes, and the defendant Whiting has appealed.

Eyma and *C. Janin*, for the plaintiff.

McHenry, for the appellant.

MARTIN, J. The defendant Claiborne, as Marshal of the City Court, having levied a *fi. fa.*, which had been issued on a judgment which his co-defendant Whiting had obtained against Gottschalk, on a number of municipality notes, claimed by the present plaintiff as his own, this suit was brought, and an injunction was obtained to stay the sale of the notes ; and the defendant Whiting is appellant from a judgment perpetuating the injunction, and decreeing that the notes be returned to the plaintiff. The court, in our opinion, erred. The testimony may, perhaps, show that the plaintiff was the owner of the notes ; but it is also established that they were handed over by Gottschalk, the defendant, in the *fi. fa.*, in the presence of the plaintiff and appellee, who, although he asserted his ownership of the notes, did not insist on the Marshal's desisting from taking and carrying them away. This circumstance divests him of any equity in opposing the sale ; especially as at the time when Gottschalk handed over the notes, there was a considerable sum of money on his counter in gold and silver, which the Marshal had declared, it was his intention to seize in satisfaction of the *fi. fa.*

It is therefore ordered and decreed, that the judgment be reversed, that the injunction be dissolved, and that the appellant Whiting recover from the appellee, damages at the rate of five per cent, on said Whiting's judgment against Gottschalk, with costs of suit in both courts.

PRINCE MATHEWS v. MICHAEL BOLAND and another.

A notary, who has given a certificate, in his official character, will not be listened to as a witness to prove its falsehood.

One, not a party to a notarial act, may prove its falsehood by competent evidence.

A slave who produces a receipt from his master, for a sum in full for his freedom, will not be entitled to an unconditional decree therefor; the judgment must be one ordering the defendant to emancipate him in the manner pointed out by law, unless some legal obstacle be shown to exist, connected with the conduct or character of the slave. C. C. 184, *et seq.* Acts 9th March, 1807; 31st January, 1827; 24th March, 1827; 16th March, 1830; 25th March, 1831.

APPEAL from the District Court of the First District, *Buchanan, J.*

BULLARD, J. The plaintiff sues for his freedom, and bases his pretensions upon a receipt of his master, in the following words: "Received, at sundry times, of Prince Mathews, my slave man, six hundred and fifty dollars, in full for his purchase. Jan'y 19th, 1842. M. Boland." He further alleges, that Boland, his former master, intending to defraud and deceive him, and combining with one Smith, pretends to have sold him to said Smith, who claims, under such pretended sale, to hold him as a slave. Both Boland and Smith were made parties.

Judgment was rendered, declaring the plaintiff absolutely free, and the defendant Smith has appealed.

In the progress of the trial, an act of sale of the plaintiff as a slave, by Boland to Smith, passed before a Notary Public, was given in evidence. It purports to be dated March 23d, 1842, and it is certified in the body of the act, that four hundred dollars, a part of the price, was paid in presence of the notary and witnesses. The notary was admitted as a witness, and swore, that the statement in the act is not true; and that, he was not even present when the act was signed by the vendor.

A bill of exceptions was taken to the admission of the notary, as a witness to falsify his own certificate. The court, in our opinion, erred, in permitting him to be sworn. In the case

Mathews v. Boland and another.

of *Briggs v. Stafford*, (14 La. 381,) we held, that a public officer, who has given a certificate in his official character, cannot be listened to as a witness to prove it false; that there is a degree of turpitude in certifying as true, what the officer does not know to be true, as well as in certifying what he knows to be false. We have more than once remarked our incompetency, notwithstanding the act of the Legislature conferring on us the power, to notice, in a very different way, these repeated deviations from official duty on the part of notaries public.

The plaintiff, however, not being a party to that instrument, might well be permitted to prove, by competent evidence, that the money was not paid; and that, although the master's receipt for the price of the plaintiff, being under private signature, was without date as to Smith, yet that Smith knew of the fact that the plaintiff had purchased his freedom, and was, in fact, in collusion with his former master. Of these two facts, he satisfied the court below by evidence; that when Smith was told that the negro had bought his freedom, he replied, "*that it mattered not, he would beat them at law.*" The same witness says, positively, that Smith knew of the plaintiff's freedom. Another fact, shown to disprove the recital in the deed, that the price was paid down, was a clumsy attempt by Smith to prove the same payment at another time. We think the court well warranted in concluding that Smith did not pay the price, and that he knew of the contract between Boland and the plaintiff.

Notwithstanding our conviction, in common with the court below, of these facts, yet we cannot concur in its conclusion, that the plaintiff is entitled to an absolute and unconditional decree for his freedom. Public policy forbids absolute emancipation by simple agreement of this kind, and requires certain formalities, which cannot be dispensed with. These formalities depend upon the age, condition, and conduct of the slave to be emancipated. See *Bullard & Curry's Dig., verbo Emancipation*; and *Nolé v. De St. Romes and wife*, (3 Robinson, 484.) Civil Code, art. 184, *et seq.*

It is, therefore, ordered and decreed, that the judgment of the District Court be annulled and reversed, and that the defendant

VOL. V. 26

Dussin v. Delaroderie.

Smith proceed to cause the plaintiff, Prince Mathews, to be emancipated and set free, in the form and manner pointed out by law, unless some legal obstacle should be shown to exist, growing out of the character and conduct of the said Prince Mathews; and that the plaintiff pay the costs of the appeal; those of the court below to be borne by the defendant Smith.

G. Strawbridge, for the plaintiff.

F. Haynes, for the appellant.

FRANÇOIS LABROUCHE DUSSIN v. DELARODERIE.

The proceedings by a plaintiff, against a Sheriff, to make him responsible, on the ground of his having illegally released the defendant from arrest, or of having neglected to seize and sell the property of the latter, must be by a regular action, and not by rule. Arts. 766 and 767, of the Code of Practice, which authorize any one entitled to money received by a Sheriff, in virtue of an order or judgment of court, to proceed against that officer by motion, do not apply to such a case.

APPEAL from the Parish Court of New Orleans, *Maurian, J.*

MARTIN, J. The Sheriff is appellant from a judgment obtained against him on a rule, whereby the plaintiff has recovered from him the sum of three hundred dollars, with interest. The facts of the case are these: * The defendant having been arrested, deposited in the hands of the Sheriff and appellant, the sum of three hundred and fifty dollars, on which he was released.* The suit proceeded to judgment in favor of the plaintiff, and a writ of *fi. fa.* was placed in the hands of the

* On the writ of arrest the Sheriff returned, that he had "arrested the defendant, who was released on his depositing three hundred and fifty dollars, as security." On the *fi. fa.* issued on the judgment subsequently obtained, he returned, that he had "received on the 3 March last, the sum of three hundred and fifty dollars in notes of the New Orleans Improvement and Banking Company, as security of the body of said defendant, arrested on said 3 March, which amount the plaintiff refuses to take at par with specie, and which I refused to advertise and sell according to plaintiff's request." There was no proof, that the notes were taken with the consent or knowledge of the plaintiff.

Sheriff, who thereon tendered to the plaintiff and appellee, the sum of three hundred and fifty dollars, in notes of the Improvement Bank, of this city, which was the money deposited by the defendant, in the hands of the Sheriff. The notes were refused, and the plaintiff required the Sheriff to sell under the *fi. fa.* On his refusal to do so, the present rule was taken, to show cause, why he should not pay over the judgment, with interest and costs, on the grounds: 1st. That he had illegally released the defendant. 2d. That he refused to sell the defendant's property in his hands. 3d. That he made no demand of property from the defendant, nor requested the plaintiff to point out any. The counsel for the Sheriff has admitted, that if he released the defendant illegally, neglected the means of seizing his property under the *fi. fa.*, or refused to sell it, it is possible the plaintiff may recover from him the amount of the judgment against the defendant; but he avers, that this must be done by a regular suit, and not by a rule. The counsel for the plaintiff has referred us to the Code of Practice, arts. 766, 767, 760, 210, 642, 643, 647; also to an act to abolish imprisonment for debt, and to Bullard & Curry's Digest, p. 784 and 785.

The Code of Practice, arts. 766 and 767, authorizes any person entitled to any money recovered by the Sheriff, by virtue of the order or judgment of a court, to obtain judgment against that officer, on motion, for the money thus received, with damages. In the present case, the rule was not obtained on the ground of money received by the Sheriff, but on the ground of his illegal conduct in releasing the defendant, and of his neglect of the proper means to seize property, and to sell it. The plaintiff's request to have the Bank notes advertised, and sold under the *fi. fa.* is an admission, that they were the property of the defendant; and repels the idea, that there was money of the defendant in the hands of the Sheriff, to which the plaintiff was entitled.

The court, in our opinion, erred, in listening to the plaintiff's claim upon a rule.

It is therefore ordered, that the judgment be annulled and reversed, and that the rule be discharged; and that the plaintiff pay the costs in both courts.

Rousseau and Budd, for the plaintiff.

Bodin, for the appellant.

WILLIAM G. HARRISON v. WILLIAM BISLAND.

The conventional subrogation in favor of a third person, from whom the creditor has received payment, must be expressed, and made at the time of the payment. C. C. 2156. Facts going to show the unexecuted intention of the parties, will not suffice.

One who binds himself unconditionally, or furnishes money, for the payment of a debt, does not thereby entitle himself to the right of the creditor who is thus paid. A legal subrogation exists in favor, not of all who pay a debt, but only of those who, being bound for it, discharge it.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Johnson* and *L. Janin*, for the appellant. The plaintiff's assignor was subrogated to the rights of the Carrolton Bank, under art. 2156, § 1. A verbal agreement to subrogate was sufficient, and parol evidence admissible to prove it. 12 Duranton, No. 117, p. 184. Boilleux, Comm. de Code Civil, vol. 2, p. 639. Dalloz, Dictionnaire Général de Jurisprudence, vol. 4, p. 403, Nos. 18, 19, 20. Plaintiff was *legally* subrogated under § 3 of art. 2156. The evidence shows, that the drafts executed by John C. Harrison were merely collateral security for the payment of the debt due by Shields, and the defendant, to the Bank. J. C. Harrison was not indebted to them, and bound himself as their security. See *Baldwin v. Thompson*, 6 La. 478. *Cox v. Baldwin*, 1 La. 405.

R. N. Ogden and *A. N. Ogden*, for the defendant.

SIMON, J. This is an attempt to make the defendant responsible for, and to compel him to pay, the sum of \$17,301 66, being the amount of two promissory notes subscribed, *in solido*, by Thomas R. Shields and the defendant, payable to the order of John Routh, and endorsed by the latter. The amount claimed is subject, however, to certain credits, more particularly stated in the petition.

The facts and circumstances of the case, as shown by the evidence, are these: Thomas R. Shields was, in the beginning of the year, 1839, indebted to the commercial house of Bullitt, Shipp & Co., in a large sum of money. In settlement of this debt, he and the defendant executed three promissory notes, *in solido*, to

Harrison v. Bisland.

the order of John Routh, which were delivered to Bullitt, Shipp & Co., who caused them to be discounted in the Carrolton Bank. The first of these notes was for the sum of \$8,246 23, payable 1st of December, 1839; the second was for \$9,055 21, payable 1st of December, 1840; and the third was for \$9,864, payable 1st of December, 1841.

On the 3d of April, 1841, after maturity of the two first notes, (the third one we have nothing to do with,) two partial payments having been made thereon previously, Shields made a settlement with the Carrolton Bank, and procured the three acceptances of John C. Harrison, then his commission merchant, to wit: one for \$4,222 74, due 1st of November, 1841; one for \$4,246 29, due 1st of December, 1841; and one for \$4,270 53, due 1st of January, 1842, which three drafts, all dated the 3d of April, 1841, were drawn for the precise amount due to the Carrolton Bank on the two first notes, were accepted by John C. Harrison, and were received by said Bank, under the following receipt given by the Cashier:

"3d of April, 1841.—Received, the acceptance of John C. Harrison of the three above mentioned drafts, which, when paid, will be in full of the above debt due by T. R. Shields and W. Bisland; but they are in no wise to novate the original notes now under protest, drawn by T. R. Shields and W. Bisland, and endorsed by John Routh, which are retained by the Bank, and will be sued upon in case either said acceptances be not paid."

"JOHN NICHOLSON, Cash'r."

The three acceptances were duly paid by John C. Harrison, and the two protested joint and several notes of Shields and Bisland were delivered up by the Bank to Harrison, who transferred them subsequently to the plaintiff, who claims the payment of those notes from Bisland, under the allegations that, on the payment of the drafts by John C. Harrison, the notes were delivered to him for the express purpose that he, John C. Harrison, might be subrogated to the rights of the Bank, and should enjoy the same recourse as the Bank had enjoyed, upon all the parties to said notes, until their final payment.

This pretension is resisted by the defendant, on the ground, that the notes sued on were by him executed as joint and several

drawer with T. R. Shields for a debt *due individually* by said Shields, and solely for said Shields' benefit and accommodation; and that, after said notes had become due, said Shields procured the acceptances of his factor, John C. Harrison, for the purpose of taking them up, which acceptances were paid at maturity, and the notes thereby extinguished; and that the plaintiff took the notes from John C. Harrison, who, as the factor of Shields, had paid them, well knowing that said notes had been paid, and the debt thereby created, entirely extinguished.

Judgment having been rendered below in favor of the defendant, the plaintiff appealed.

From the testimony of the President, Cashier, and Notary of the Carrolton Bank, it appears, that at the time when the settlement was made and the acceptances delivered, it was understood that if the drafts were paid, the notes would be given up to Harrison; that after the drafts were paid, Harrison required the notes to be given up to him, and asked for a subrogation; that this was agreed to by the President, but it being considered unnecessary by the Notary, no subrogation was executed. None of the witnesses are able to fix any time at which the subrogation was applied for, and consented to; one of them only presumes, that it was applied for before the maturity of the drafts. The President of the Bank thinks that Harrison called on him for the subrogation before he paid the drafts; but they all agree that the Bank was, at all times, willing to give an act of subrogation, and that Harrison was informed that this was unnecessary. The Cashier states, that at the time of the agreement, nothing was said about subrogation, but that the Bank considered that, on payment of the drafts, Harrison was entitled to the notes. It was his opinion that Harrison, on payment of the drafts, would have all the rights of the Bank, and that no act of subrogation was necessary for this.

The plaintiff rests his right to recover, not only upon the conventional subrogation alleged in his petition, but also upon the legal subrogation to which, he contends, he is entitled as resulting from the nature of the obligation by him contracted *for the defendant*, and *his co-debtor in solido*.

1. As to the conventional subrogation: the facts from which it is attempted to be established, have already been stated in sub-

stance, and it does not appear to us that any thing has been shown to bring it within the meaning of art. 2156 of the Civil Code, the first paragraph of which provides that, "the subrogation is conventional, when the creditor, receiving his payment from a third person, subrogates him in his rights, actions, privileges and mortgages against the debtor. This subrogation *must be expressed, and made at the same time as the payment.*" Now, although it seems to have been the idea of the parties that John C. Harrison was, after payment of the drafts, entitled to the possession of the two notes, was it really and expressly agreed between them, that said Harrison should be subrogated to the rights of the Bank? Was it so expressly understood when the payment was made? The word "subrogation," appears to be used by the witnesses in reference to the request made by Harrison, that the notes should be given up to him after payment: for this, an act was thought unnecessary; because, as the notary understood, the notes were not mortgage notes, and their possession was sufficient: but to say, that this delivery of the notes was made in view of an express subrogation agreed on between the parties, would be supplying this legal requisite, or condition, by facts going merely to show the unexecuted intention of the parties, and giving to inferences, drawn from their acts and conversations, the effect of what the law requires to be an express stipulation. "*La subrogation est expresse, lorsqu' elle résulte clairement et sans équivoque des termes de l'acte: dans le doute, la dette seroit réputée éteinte.*" Favard de Langdale, V. Subrogation, § 1. No. 6. Touillier, V. 7, No. 117, says: *Il existe une différence bien remarquable entre la formule par laquelle le créancier, en recevant ce qui lui est dû, réserve les droits ou le recours de celui qui paye, et celle où il le subroge dans ses droits, ou les lui cède. Dans le premier cas, nulle convention entre celui qui paye, et le créancier qui reçoit. La créance est éteinte. La subrogation, au contraire, est une vente que le créancier fait de la créance.* See also Duranton, V. 12, Nos. 116 117, 118. Here, it seems to us, that the parties never had in view any other object but to preserve the rights, or the recourse, which they conceived Harrison had a right to exercise by virtue of the notes which were to be given up to him; but, there was nothing expressly agreed between them as to the rights of the

Bank, which were a matter entirely distinct, and which were never made the subject of a conventional subrogation. Again, to give this effect to their act, it must be expressly stipulated.

It has been said, that the conventional subrogation contended for, results from the terms of the receipt. We think not. This receipt was so worded as to prevent a novation as between the Bank, and the debtors; but there is clearly nothing in it which can be construed as intimating, that a subrogation is to follow in favor of the acceptor of the drafts. The notes are to be retained by the Bank to be sued upon, in case the acceptances are not paid. This receipt would, on the contrary, exclude the idea of there being any subrogation at the time that the acceptances were delivered, since all the rights of the Bank to the notes were carefully preserved until the full and complete payment of the drafts, and were to be exercised for the benefit of the Bank. Surely, it will not be pretended that the Bank could not retain the possession of the notes, until all the drafts were discharged.

But, even supposing that the plaintiff has succeeded in showing an express agreement to subrogate, has he satisfied us that it was made at the same time as the payment? On this fact, the evidence leaves us entirely in the dark. Neither of the witnesses is able to fix any period at which the conversations took place. Was it at the time of the acceptances? Was it before, or at the time that the drafts were paid? When was it? These questions are unanswered by the record, except that the witnesses presume that it must have been before the maturity of the drafts. We have already shown that, from the receipt itself, no subrogation could exist before the payment of the drafts, for the rights of the Bank to the notes were, according to the receipt, to remain unimpaired and unaffected, until the acceptances were completely paid; and it is obvious, that no valid subrogation could have been made at any other time, but when the drafts were paid. "*Le moindre intervalle entre le paiement et la subrogation la rend nulle et sans effet; car le créancier ne peut plus céder des droits qui n'existent plus.*" Touillier, v. 7, No. 116. Thus, it was the duty of the plaintiff to show, that the subrogation took place, in the words of the law, "at the same time as the payment," of the drafts. Under the receipt, it could not exist before; and under the requi-

site of the law, it could not be made after. We think the plaintiff has failed in his attempt to establish a conventional subrogation.

2. As to legal subrogation : this question does not present much difficulty. The notes sued on were due at the time that the acceptances were furnished, and John C. Harrison was not bound in any manner, to pay the debt of Shields & Bisland. By accepting the drafts, he furnished to the debtors of those notes, the means of satisfying their obligation, as instead of loaning them money for that purpose, he obligated himself absolutely to pay the amount due, at certain fixed periods. He did not bind himself as their security, for, his obligation which was an absolute one, was not subsidiary ; and being distinct and independent from the original notes, did not depend upon the non-payment of the principal debt. So it was taken by the Bank ; and John C. Harrison became their absolute debtor, though on the notes intended to be paid, he was not bound with or for the original debtors. Now, art. 2157 of the Civil Code, says, that "subrogation takes place of right, for the benefit of him, who, being bound with others or for others, for the payment of the debt, had an interest in discharging it." What interest had John C. Harrison in discharging the notes sued on ? It is true he obligated himself subsequently to pay them, but this was not a consequence of the original obligation which he had nothing to do with ; nor was he, under any previous promise, bound to satisfy it. We cannot look upon his acceptances, by him paid at maturity, as giving him any more right than if, instead of accepting drafts, he had furnished the money for the payment of the notes ; and in the case of *Nolté v. His Creditors*, 7 Mart. N. S. 603, this court held, that, "there is no law which gives to the party who furnishes money for the payment of a debt, the rights of the creditor who is thus paid. The legal claim alone belongs, not to all who pay a debt, but only to him, who being bound for it, discharges it." Again, John C. Harrison was not bound to pay the notes sued on, and had no interest in discharging them.

Upon the whole, we conclude that the plaintiff is not entitled to recover. The evidence shows, that the debt was originally contracted for the sole benefit of Shields ; that Bisland, though con

nected with him in the ownership and cultivation of a plantation, signed the notes as his partner's surety ; that John C. Harrison was Shields' factor, and kept an account current with him at the time that the acceptances were furnished ; indeed, it has been shown, that the amounts of the drafts, or the acceptances, were immediately charged to Shields in his separate account current with Harrison. This charge was made on the 30th of April, 1841, and is included in the account rendered on the 30th of June, 1841, long before any of the drafts became due. In the account rendered of the same date to Bisland & Shields, a balance is shown to be due by Harrison to them of \$5,915 73 ; and on the 31st of December, 1841, at the time that the last of Harrison's acceptances became due, he rendered an account to Bisland & Shields, showing a balance in his hands in their favor of \$8,955. On the same day, another account was by him rendered to Shields individually, in which he credits his individual account, in which he is charged with the acceptances in favor of the Carrolton Bank, with a balance of \$8,869 78, which he says is transferred to Shields' credit from the account of Bisland & Shields, by order of Shields himself. All these accounts and transactions show clearly that John C. Harrison never intended to look to the defendant for the payment or reimbursement of the drafts ; that Shields was the only person at whose request and for whose benefit the acceptances were furnished ; and that in the transaction between Harrison and Shields, which was one made in the course of their ordinary dealings, Bisland was entirely out of the question. Shields alone obtained the acceptances from Harrison ; Shields alone was charged with them ; and to Shields alone should the plaintiff look for the reimbursement of John C. Harrison's advances. The debt due by Shields & Bisland, *in solido*, to the Carrolton Bank, was discharged and extinguished by the payment of Harrison's acceptances, as effectually as if Shields had borrowed money for that purpose ; and we concur with the Judge, *a quo*, in the opinion, that to allow the present action, would be to authorize factors to keep alive the liability of endorsers and others, whenever they paid the notes or bills of their constituents, by their orders, after protest. This cannot be permitted.

Judgment affirmed.

Buchanan and another v. Locke.

HENRY ANDERSON and another v. PETER CUNNINGHAM.

APPEAL from the Commercial Court of New Orleans, *Watts, J. L. C. Duncan*, for the plaintiffs.

Mitchell, for the appellant.

GARLAND, J. This case was before us in June, 1842, (2 Robinson, 463,) and was then remanded for a new trial, principally for the purpose of ascertaining whether a sum of \$529 62, received by the plaintiffs of Dakin & Dakin, was credited to the defendant, in the account on file. The evidence on that point now satisfactorily shows, that the defendant has a credit for the nett proceeds of Dakin & Dakin's note. The inferior Judge has fully examined the case, and has, in our opinion, allowed the defendant every thing he has shown he is entitled to claim.

Judgment affirmed.

WILLIAM BUCHANAN and another v. SAMUEL LOCKE.

Plaintiffs' counsel, in an action to be tried by jury, left the court-room for a few minutes, after another jury case had been called, with the trial of which the court could not proceed for the want of a sufficient number of jurors, there being only five or six present, and attachments having been issued. During his absence their case was called, and the plaintiffs nonsuited. At the time of his return, a sufficient number of jurors had not yet arrived. On appeal, *held*: that the plaintiffs should not have been nonsuited. *Per curiam*. Had their counsel been present, he could not, in the language of art. 536 of the Code of Practice, *have pleaded their cause*, no jury having been formed; nor could the defendant, for the same reason, have tried the case *ex parte*.

APPEAL from the District Court of the First District, *Buchanan, J.*

MORPHY, J. The plaintiffs and appellants complain of a non-suit entered against them, under the following circumstances: Their cause, which was to be tried by a jury, stood last upon the list of cases set down for trial on the 17th of June, 1840. A pre-

vious cause had been called, in which the parties were ready for trial, but a full jury not being in attendance, attachments had been issued for the absent jurors. Before these attachments were returned, and when no other cause could be tried, by reason of the one then before the court, and of the absence of a full jury, (there being only five or six jurors present,) this case was called, and the plaintiffs nonsuited, in consequence of the momentary absence of their counsel. The latter having returned into court about ten minutes after the nonsuit was granted, took a rule on the adverse party to set aside the order of nonsuit, and to have the case reinstated. This rule having been discharged, the plaintiffs appealed.

We feel indisposed, generally, to interfere in cases of this kind, which depend much on the rules of the inferior courts, and in which the Judge must necessarily have much discretion; but it appears to us, that, under the circumstances of this case, which are undisputed, the plaintiffs should not have been nonsuited. Had their counsel been present, he could not have *pleaded their cause*, in the language of article 536 of the Code of Practice, because the tribunal which was to hear it could not be formed. The defendant could not have tried the cause *ex parte*, if such had been his desire, there being no jury in attendance. The plaintiffs' counsel, who, the evidence shows, was ready for the trial, no doubt left the court-room, believing that nothing could be done in his case for some time, as there was no jury in attendance to try it, and as a previous cause was actually in progress of trial, by the attaching of jurors to complete a jury. Justice requires, in our opinion, that the case should be reinstated.

It is, therefore, ordered, that the judgment of the District Court be reversed, and that this case be remanded to be proceeded in according to law; the appellees paying the costs of this appeal.

Peyton, for the appellants.

Durell, for the defendant.

Penn and another v. Collins and others.

ALFRED PENN and another v. WILLIAM COLLINS and others.

Where the lessors of property, without the consent of the sureties of the lessees, take back a part which had been occupied by the lessees as a dwelling, and relet it to a third person, the sureties will be released, the contract being materially altered without their assent. *Per curiam*. It must be presumed, that the sureties consented to bind themselves in relation to the situation of the whole property at the time of the lease, and in consideration of the subrogation to which they were legally entitled to the lessors' rights and privileges, among others, upon the furniture which existed in the dwelling house. C. C. 2675, 2676, 2677, 2679, 3030.

Where the lessors of property, having sued the lessees for the rent due, and to come due under the contract, and caused property, on which they had the lessors' privilege, to be seized to an amount equal to the rent due, and to come due, abandon the seizure without a trial, the sureties of the lessees will be discharged.

A party dissatisfied with the charge of the Judge to the jury, must require him to give his opinion in writing, and except to it before the jury retires; it cannot be done afterwards. *A fortiori*, is he precluded from making the charge a ground for a new trial, unless excepted to in due time. C. P. 517.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Lockett and Micou*, for the appellants.

Rousseau and Josephs, contra.

SIMON, J. Two suits having been instituted against W. & P. Collins, as principals, and Wilcox, Anderson & Co., as sureties, to recover the amount of five months rent of certain property, leased by the plaintiffs to said W. & P. Collins, at the rate of three hundred dollars a month, they were consolidated and tried together as one suit. The matter in controversy was submitted to a jury, who found a verdict in favor of the plaintiffs against the Collins, and in favor of the sureties against the plaintiffs. A judgment was rendered accordingly; and the latter, after a vain attempt to obtain a new trial, took this appeal.

The plaintiffs' claim is founded upon a contract of lease executed on the 19th of July, 1838, by which it is agreed, that they lease to W. & P. Collins, for the term of two years, from the first of November, 1838, the brick shed and yard fronting on Magazine street, between Girod and Julia streets, usually called Penn's

Yard, and the frame dwelling house adjoining the same ; for which the lessees agreed to pay \$375 per month, payable monthly. The other defendants, Wilcox, Anderson & Co., intervened in the contract, to guarantee the punctual performance of the agreement on the part of the lessees.

The sureties resist the claims set up in the two suits, on two grounds: 1st, That they are not bound, because the plaintiffs, having taken possession of, and advertised the property to rent in one of the public newspapers, and finding no new tenant, then altered the original contract, and made a new agreement and arrangement with W. & P. Collins, to which the sureties were not parties. 2d, That in a previous suit, brought by the plaintiffs against W. & P. Collins for rent due, and to fall due until the expiration of the lease, said plaintiffs caused to be seized goods to the value of eight thousand dollars, on which they had a privilege and preference, but that they released and relinquished said property, without trial, thus depriving the sureties of the means of amply securing themselves.

On the first ground of defence, the evidence shows, that H. W. Palfrey, a witness examined on the trial, was the agent of the plaintiffs in this transaction ; that, after the lease was made, said agent made an arrangement in writing, with W. & P. Collins, to take the dwelling house off their hands, and rent it, and to reduce the rent \$75 per month. The witness does not know whether the sureties knew of the agreement ; but he did not consult them about it, and does not think he notified them of it. He was requested by W. & P. Collins to relet the premises for the residue of the lease, as the latter could not afford to keep them ; and an advertisement produced on the trial, was put in the papers at the Collins' request. This advertisement is dated the 20th of August, 1839, and is signed by Palfrey & Co., offering to rent the whole property. On the 15th of January, 1840, the dwelling house was leased by the plaintiff's agent to one Wm. G. Brown, who accepted and signed the following written contract, or agreement, to wit : " The lessee is not to use any part of the property leased, in any way that may affect the insurance ; is not to sublease it without the written consent of the lessors, and is to return it in the same order in which it is received, &c. Henry W. Palfrey, agent of J. Erwin and A.

Penn, hereby leases to W.S. Brown, agreeable to the above conditions, the dwelling house in Magazine street, now occupied by the lessee, to be used and occupied as a dwelling house, and for no other purpose, from 25th of December, 1839, to 1st of November, 1841 ; for which the lessee agrees to pay seventy dollars per month, payable by his notes, payable quarterly."

With this evidence, it appears to us that the jury did not err in declaring, by their verdict, that the sureties were discharged. It is clear that the contract was materially changed and altered, without the sureties' consent and participation, and this must have the effect of releasing them. By the original contract, the whole property was leased for the sum of \$375 per month, payable monthly ; whilst, in consequence of the lease to Brown, the dwelling house was withdrawn by the lessors, who rented it in their own name, to another person, for the sum of \$70 per month, payable quarterly. The consequence of this second contract was, that the first lessees were permitted to abandon a portion of the leased premises, and to remove their furniture from the dwelling house, whereby the securities were greatly lessened to the prejudice of the sureties. The lessors had originally a right of pledge, or privilege, upon that furniture, for the payment of the whole rent. This right was abandoned by the subsequent contract passed by the lessors, in their own name, with the second lessee ; as the dwelling house, having been taken out of the first contract, the first lessees' furniture, which may have existed in said house, became released from the exercise of the lessors' right to have it seized and sold, to satisfy the rent subsequently due upon the property. Civil Code, arts. 2675, 2676, 2677, 2679. This the lessors were not at liberty to do, without the consent of the sureties. It is true, that the amount of the rent was reduced, but the securities were also greatly diminished ; and as we may fairly presume, that the sureties consented to bind themselves in relation to the situation of the whole property at the time of the lease, and in consideration of the subrogation, by which they were legally entitled to the lessors' rights and privileges, among others, upon the furniture which may have existed in the dwelling house, said lessors could not, by their own act, deprive the sureties of their legal subrogation. Civil Code, art. 3030.

Penn and another v. Collins and others.

It has been said, that the lease of the dwelling house was made in the name, at the request, and for the benefit of the defendants, W. & P. Collins; that it is nothing but a sub-lease, which the lessees had a right to pass to another person. This may have been originally the intention of the parties, when the whole property was advertised for rent; but the lease of the dwelling house was subsequently made in the name of the lessors, under different conditions, for a different price, and for a longer term than that mentioned in the first lease. W. & P. Collins do not appear to have had any interest in the lease to Brown; their name is not even alluded to in the act, and it seems that it was executed after the dwelling house had been taken off the Collins' hands. The circumstance of this suit having been brought for the rent at the rate of \$300 per month shows also conclusively, that the Collins' responsibility for the rent of the dwelling house, was at an end from the time that it had been rented to Brown by the plaintiffs; from that time, their furniture and other effects in the house had been released.

The first ground of defence being, in our opinion, well founded, it is unnecessary to investigate the second; but we cannot forbear remarking, that an attentive examination of the evidence on this point, has led us to the conclusion that it must also prevail.

With regard to the motion for a new trial made by the plaintiffs on the grounds that the court, *a qua*, erred in instructing the jury, and that the verdict was rendered upon a misapprehension by the jury of the charge of the court, we have no other evidence of the charge complained of, but the written motion of the plaintiffs. The practice is well settled, that the party who is dissatisfied with the charge of the court, must require the Judge to give his opinion in writing, and take his exception to it before the jury retires; it cannot be done afterwards, and, *a fortiori*, is the party precluded from making it a ground for a new trial, unless excepted to in due time. Code of Practice, art. 517. 17 La. 545.

Judgment affirmed.

Stiff v. Nugent and another.

JAMES STIFF v. GEORGE NUGENT and another.

Where cotton, sold by the bale, does not correspond with the samples, by reason of some defect or vice unknown to the vendee at the time of delivery and acceptance, he will be entitled, even when there is no fraud, to recover the difference between the price, and the value of the article as affected with the defects and vices existing at the time and place of delivery; as well as the charges necessarily incurred in a foreign port, to which it is shipped, in consequence of discovering that it was falsely packed, and of inferior quality.

A commission to take testimony, addressed to a Vice-Consul of the United States or a Commissioner named by the court, returned executed, under his signature as Commissioner, is admissible on proof of his signature, and of his having been reputed, and having acted as such Vice-Consul at a period prior to the execution of the commission.

In an action, by the purchaser, for damages in consequence of the inferiority of the article to that of the samples by which it was sold, interest may be recovered, at five per cent, from judicial demand, but not from the date of the purchase.

Interest is a matter of law, and when arising, *ex mora*, is in the nature of damages for non-payment of money due by contract.

APPEAL from the District Court of the First District, *Buchanan, J.*

BULLARD, J. The plaintiff alleges, that he purchased of the defendants, a lot of cotton, in the usual course of trade, and which was to have been sound, merchantable, and well packed according to the samples, and to justify the price given for it. That he shipped the cotton to Liverpool for sale, and that a large part was found falsely packed, the centre of the bales being very inferior, containing quantities of gin-waste, and entirely different from the samples exhibited at the sale,—which produced a loss of three farthings per pound in the Liverpool market, the cotton selling for that much less than it would have sold for, if it had been equal to the samples. That the loss incurred amounted to £258 11s. 9d., equal, at the then rate of exchange, to \$1287 18, for which they sue, as the amount of damages sustained by them. There was a verdict for the plaintiff, for the amount claimed, and the defendants appealed from the judgment pronounced thereupon.

The appellants urge, that the record does not show that the plaintiff continued to be the owner of the cotton, and that the loss

sustained, and charges incurred in Liverpool, were supported by him. To this it is a satisfactory answer, that the question was expressly left to the jury, by the charge of the court; and that there is sufficient evidence to show, that the cotton was really sold for the account of the plaintiff.

It is next contended, that the charges which form a part of the claim, were not properly chargeable to the defendants. We are of opinion, that any charges incurred, in consequence of the discovery that the cotton was falsely packed, and of very inferior quality, were properly left to the jury.

There is a bill of exceptions taken by the defendants, to the admission of the return of a commission, purporting to have been executed by the Vice-Consul of the United States at Liverpool, upon the proof of his reputed character, and that he acted as Vice-Consul in 1837, and upon proof also of the handwriting of said person. The court did not err. The commission was addressed to the Consul, or Vice-Consul of the United States, as Commissioner named by the court, and it is sufficiently shown, that it was executed by him in that capacity.

The evidence shows clearly, that a great part of the cotton was falsely packed, although there is nothing to induce the suspicion that the defendants knew of it. It was evidently done at the gin-house. The purchasers were, therefore, clearly entitled to an indemnity. The evidence does not satisfy us, that the jury erred in assessing the damages; but they certainly exceeded their authority, when they gave interest on the amount of damages, from the 12th of April, 1838, before the institution of the suit. It was their province to assess the damages sustained by the plaintiff. Interest is a matter of law, and when arising, *ex mora*, is in the nature of damages for the non-payment of money due by contract. In other respects, the verdict and judgment appear to us, fully sustained by the evidence.

The judgment of the District Court is, therefore, reversed, and it is adjudged and decreed, that the plaintiff recover of the defendants, *in solido*, *twelve hundred and eighty-seven dollars and eighteen cents*, with interest, at five per cent, from the 25th day of January, 1839, the day of judicial demand, and the costs of the

Stiff v. Nugent and another.

District Court, those of the appeal to be paid by the plaintiff and appellee.

Maybin, for the plaintiff.

T. Slidell, for the appellants.

SAME CASE.—APPLICATION FOR A RE-HEARING.

T. SLIDELL, for a re-hearing:—The rule has, in this case, been recognized, that in a sale where there is no fraud, nor even a suspicion of it on the part of the vendor, he is answerable to the vendee, according to the difference of value in a foreign market, selected by the vendee, and not designated in the contract of sale. This is a most important subject. The principle, it is believed, is new in our jurisprudence; and it is hoped, that the court will not, in view of the immense commercial transactions of our State, deem its reconsideration an idle expenditure of time.

In the case of *Brown v. Duplantier*, Judge MARTIN adopts the standard of the place of contract. "It appears to us," says he, "that the only measure of damages is, the difference in the price given, and that which would have been given, had there been no deception in the bales." 1 Mart. N. S. 321. At page 318 of the same case, he observes: "Whether a vendor, who has a deceit practised on him in the sale, gain or lose by the subsequent sale of the thing, his right to the action, *quantum minoris*, remains perfectly the same. This subsequent sale is his own act. It could not place his vendor in a worse situation, neither do we think it may place him in a better. The second sale is at the first vendor's risk; he is not bound to account for any part of the profits he makes thereby, as he could not claim a compensation for any loss resulting from it. The *excess of price paid* is, in the hands of the first vendor, money, which, *ex æquo et bono*, he is bound to refund—money had and received to his vendee's use; the latter has the right to call it out of the former's hands, and this right is independent of any posterior act which may render the purchase beneficial or burdensome, in a greater or less degree."

"Hence, in this case, we find the reduction awarded by the court to be the difference between fourteen cents, and eleven cents per pound; in other words, the difference in value in New Orleans." *Ibid.* 320. What are the advantages of this standard?

I. It is more certain. It is certain as to time—it is the time of the sale itself. It is certain as to the place—the place of the sale itself. Each contracting party knows at the moment of the contract, with certainty, the character of his duty or his responsibility. Vendor and vendee have both before their eyes, in the market of the day and place, the standard of reimbursement, if it should turn out that the article is not what the one honestly supposed he was selling, and the other that he was purchasing.

Not so, where the other standard is adopted. In transactions of this sort, the buyer does not disclose his market, nor the time at which he proposes to sell. He, in truth, has, perhaps, no fixed determination on the subject, and if he had, would not communicate it to the vendor. How, then, is either party to know the extent of the vendor's future responsibility? The purchaser may ship to New York, to Havre, to Boston, to Liverpool, or to Amsterdam. When the cotton has arrived at the foreign port, he may sell at once, or defer the sale. All these matters are left at the buyer's discretion. Great fluctuations, too, may occur in the market selected, in the relative prices of an article such as it was supposed to be, and an article such as it really was.

II. There is equality in the standard of the domestic market at the date of the sale, because both know it, and neither has any choice; but there is a want of equality in the rule recognized by the present decision. The seller is placed wholly in the power, and at the discretion of the buyer. Is this just, where both are in good faith? where dishonesty and intentional deceit, are not only not proven, but are expressly negatived by the opinion of the court?

Lastly—It is respectfully submitted, that interest is not recoverable—the claim is purely unliquidated.

BULLARD, J. A re-hearing is asked in this case, upon the supposition, on the part of the counsel for the defendants, that we have, in the opinion first pronounced, sanctioned a deviation from the rule laid down in the case of *Brown v. Duplantier*, 1 Mart. N. S.

Stiff v. Nugent and another.

318. That case, and the one which now engages our attention, are very similar. In both cases, the deception in packing was discovered in the foreign market. In the case of *Brown v. Duplantier*, it was found that the cotton, on the exterior of the bales, was worth two pence per pound more than that it covered. The court said, that the only measure of damages is the difference between the price given, and that which would have been given, had there been no deception in the bales. But the principal point upon which that case turned was, whether a purchaser, who had parted with the thing, could maintain the action, *quantum minoris*, which was solved affirmatively. In the present case, both parties acquiesced in that part of the Judge's charge in which he told the jury, that if the goods did not correspond with the contract, by reason of some defect, or vice not known to the vendee at the time of the delivery and acceptance of them, he is entitled, where there is no fraud, to recover the difference between the price paid and the value of the goods, as affected with their defects and vices, existing at the time and place of delivery. The court added, that the expenses necessarily incurred at the foreign port, to which the vendee ships the goods, in consequence of the difference in quality, may be assessed by the jury, on account of the warranty which our law implies in every sale. This part of the charge was excepted to by the defendants' counsel; but we held it to be correct; nor do we now see any good reason for thinking otherwise. The expense attending a more thorough examination of the cotton, in consequence of the discovery that it had been falsely packed, with a view to ascertain the proportion of trash packed among good cotton, is a direct loss occasioned to the purchaser by the false packing, and which, we think him entitled to recover back. Nearly all the cotton sold in this market is destined for exportation, either coastwise, or to foreign countries. It is sold here according to samples drawn from the outside of the bales, and the discovery of frauds in baling the articles, is generally made, when the cotton is, or is about to be, sold for consumption. It is difficult, therefore, to apply literally the rule contended for by the counsel for the appellants; but after all, there cannot be a great difference between the relative value of

Fox v. Walsh.

gin-trash, and merchantable cotton, here and in Liverpool. The whole was left to the jury.

Re-hearing refused.

BERNARD FOX V. JOHN W. WALSH.

To recover in a redhibitory action, the purchaser must prove that the alleged vice or malady existed before the sale to him, unless it makes its appearance within the three days immediately following the sale; in which case, it will be presumed to have existed before. C. C. 2508.

APPEAL from the District Court of the First District, *Buchanan, J.*

Mitchell, for the appellant.

Benjamin, for the defendant.

MORPHY, J. This is a redhibitory action, in which the plaintiff seeks to recover the price of a slave named Permili, on the allegation, that prior to, and at the time of the sale to him, she was affected with a confirmed and incurable consumption, of which she died about ten months after the sale. There was a judgment below in favor of the defendant, from which the plaintiff took this appeal.

The buyer, who institutes a redhibitory action, must prove, that the alleged vice or malady existed before the sale to him, unless it makes its appearance within the three days immediately following the sale, in which case it is presumed to have existed before. Civil Code, art. 2508.

The sale to the plaintiff took place on the 17th of April, 1839. The witnesses of both plaintiff and defendant agree in representing the slave Permili, or Amelia, as having been at that time a stout, fat, and healthy looking girl; and persons who knew her, while she was owned by the defendant, declare, that she was always apparently in perfect health, and was never sick to their knowledge. Dr. Stone, who was called by the plaintiff to see the girl, towards the end of 1839, or in the beginning of 1840, found

her then suffering from a violent cough, pains in her breast, fever, &c. He understood from Mrs. Fox, that the slave had been afflicted with a violent cough for two or three weeks previous, and that she had always discharged her duties as a servant, up to the period when she was supposed to have taken cold. He thought, that medical aid should have been procured at an earlier period, but the plaintiff stated, as a reason for not having sooner called in a physician, that they thought it a mere cold. He attended on her afterwards at the defendant's house, two or three weeks before her death. From what he saw, Dr. Stone declared, that he had no doubt that the disease was constitutional; that, from the result of the disease, he believed, that tubercles existed previously in the lungs, and that from a violent cold, inflammation followed, and the tubercles softened down and produced abscesses, which resulted in death; that it is often the case that tubercles remain dormant giving no evidence of the disease; that inflammation, from any cause, will develop them suddenly, and that they will terminate in consumption; but that he could not say positively, from what he saw, that tubercles existed in the slave in question, in April, 1839; he added that a person may live with tubercles in their lungs, arrive at a mature age, and then die of another disease than consumption, &c.

Dr. Davézac visited the girl shortly after the sale. She had a cough which, yielding to treatment, induced him to discontinue his visits. He cannot tell whether the disease of which Permili died, was constitutional or not, as he did not examine her, having at the time no reason to suspect, that she had any thing more than a cough; that tubercles properly so called, cannot exist in the lungs, unless hereditary, but that death may be occasioned from consumption arising from cold or accidental causes, without tubercles in the lungs; that physicians may, by the nature of the expectoration, discover frequently whether tubercles exist in the lungs without autopsy, but these indications are deceptive, and may lead to the belief, that tubercles exist, when there are none, &c.

This testimony leaves it doubtful whether the malady of which the slave died, existed previous to the sale. It broke out long after its date, and after the girl had had a bad cold for two or three

Duggan v. De Lizardi and others.

weeks. The physician who was then called, professes himself unable to say whether the tubercles, supposed to be the cause of the disease, existed in April, 1839; and the other gentleman who was examined, informs us, that the indications by which physicians believe, that they can ascertain the existence of tubercles without autopsy, are deceptive, and very apt to mislead. These doubts might have been removed by a *post mortem* examination, but none took place. In the absence of any positive proof of the pre-existence of the disease, and with the evidence the inferior Judge had before him of the apparently sound, and healthy condition of the girl at the time of the sale, we cannot say, that he erred in the conclusion at which he arrived.

Judgment affirmed.

JOHN DUGGAN v. FRANCISCO DE PAULO DE LIZARDI and others.

One who appeals must bring before the Supreme Court all the parties, contradictorily with whom the judgment complained of was rendered, and who are interested in its remaining undisturbed.

There is a difference between the obligations of co-heirs, and of joint obligors by contract. The law apportions among the heirs, all the charges of the inheritance, and each heir may, perhaps, be sued separately, for his virile share. C. P. 120. C. C. 1370, *et seq.*; *aliter* as to co-obligors by joint contract, all of whom must be sued together. C. C. 2080 *et seq.* In the one case, it is a condition of his inheritance that each heir shall pay his share of the debt; but, in the other, no one of the obligors can release himself at will.

- * In actions on joint obligations, all the original parties must be sued together, even those who may have performed their part; no judgment can be pronounced, unless it be shown that all joined in the obligation; any judgment must be against each defendant separately for his portion, but, *in solido*, for the costs. (C. C. 2080 *et seq.*;) and all the parties below must be made parties to the appeal, though a part only have appealed, or the appeal must be dismissed. Those who have not appealed must be cited as appellees.

APPEAL from the Commercial Court of New Orleans, *Watts*,

J. The petitioner alleges, that the defendants, who had formed a particular partnership under the style of the New Orleans Tobacco Warehouse Company, are indebted to him in the sum of

\$16,692 50, for services rendered by him, under a contract with them, as a superintendant of their establishment, at an annual salary of \$5000, commencing from 10th April, 1837. Judgment was prayed for, against the defendants, in proportion to their interest in the establishment, as set forth in the petition.

Judgments by default were confirmed against some of the defendants; others filed general denials; and some specially denied, that they ever belonged to the association. There was a judgment in favor of the plaintiff for \$10,138 69, and against each of the defendants for their proportions of that sum, calculated according to their respective interests in the partnership, and against the whole, *in solido*, for the costs. From this judgment five of the defendants alone appealed. The others were not cited as appellees.

Benjamin, for the plaintiff, moved to dismiss the appeal, on the ground that the action was on a joint obligation, and all the defendants were not made parties; citing *Drew v. Atchison and others*, decided at Alexandria, at the October term, 1842.

Grima, Soulé, L. Peirce, and Janin, for the appellants.

BULLARD, J. The plaintiff and appellee moves to dismiss this appeal, on the ground that the action is against joint obligors, and that all the defendants in the court below, are not made parties to the appeal. His counsel relies upon the case of *Drew v. Atchison and others*, 3 Robinson, 140, decided at the last term at Alexandria, in which we held, that, in actions upon joint obligations, all the parties to the judgment below must be before us on the appeal, otherwise it would be dismissed.

It is urged by the counsel for the appellants, (four* out of eleven of the original defendants,) that the above decision is not in harmony with several previous ones rendered by this court, and particularly that of *Burke v. Erwin's Heirs*, 6 La. 320, and *Farrar v. Newport et al.*, 17 La. 346.

Our desire to put the question at rest, and our respect for the opinions of those members of the profession who doubt the correctness of the last decision, have induced us to consider the question as still open, and to review attentively the several decisions heretofore rendered.

* Five appealed.—R.

It has long been recognised by us as a general rule, that he who appeals must bring before us all the parties, contradictorily with whom the judgment complained of was rendered, and who have an interest that it should remain undisturbed. This rule has been applied particularly to warrantors, and in actions of partition; and in relation to the latter, its propriety is admitted by the counsel in this case. It would, indeed, be difficult to give a good reason, why, in all cases, the same parties should not be before us on appeal, who were parties to the judgment, when it is considered that we have the power to render such judgment as should, in our opinion, have been given below.

It is said, that the case of *Burke v. Erwin's Heirs*, sanctioned a different proceeding. It is true the court said, in that case, that the omission of some of the defendants to appeal, could not affect the right of the others to do so. That is strictly true, and perhaps the court did not go far enough, and say, that when only a part of the defendants appeal, they ought to bring the others before us. But there appears to us to be a difference between the obligation of heirs, and of joint obligors by contract. The law portions among the heirs all the charges of the inheritance, and each heir might be sued, perhaps separately, for his virile share. Civil Code, art. 1370, *et seq.* Code of Practice, art. 120. Not so the co-obligors by a *joint contract*. The code requires that all should be sued together. In the one case it is a condition of his inheritance, that each heir shall pay his share of the debts, and he may exonerate himself by renouncing the succession; in the other, no one of the joint obligors can release himself at will. The executors of the last will of Erwin had employed an attorney whose fee was a charge upon the estate, and judgment was asked against the heirs, each for his virile share. Some of the heirs did not appear, and yet the plaintiff took judgment against the others. Some of the defendants appealed, and the motion was to dismiss the appeal on the ground, that all the defendants had not appealed. But it was not until the case of *Drew v. Atchison* arose, that we had occasion to consider those peculiar provisions of the code which govern actions on joint obligations—provisions which require that all the original obligors should be sued together, even those who are known to have paid their share; that no judgment

shall be pronounced unless it be shown that all joined in the obligation, and that judgment shall be given separately against each defendant for his proportion of the debt, but, *in solido*, for costs. Civil Code, art. 208, *et seq.* Whatever we may think of the wisdom of such provisions, we are not authorized to disregard them; and we think it fair to conclude, that the Legislature intended there should be the same parties on the appeal as in the court below, when there exists a privity of contract between them. In no other way can we render that judgment, in a joint action, which ought to have been rendered in the court below, if we should be of opinion that the court erred. The contrary practice would lead to great incongruities. In the same action, and on the same contract, A. might be condemned to pay one sum as his share, and B. another and a different one; nor do we conceive that we impose any hardship on such of the parties as are dissatisfied with the judgment below, to place the case before us as it was before the first Judge. Those who do not choose to appeal, may be cited in as appellees. To this it is said, the appellant has nothing to ask of those who have been condemned like himself. But suppose it be the plaintiff who appeals, must he not bring all before us who were cited below? And if, in the court below he was bound to sue even a party who had paid, would he not be obliged to cite him on the appeal, in order that the same question might be presented to the Supreme Court which was presented below. If this be true of the plaintiff, why should it not apply to one or more of the defendants, when they seek to reverse a judgment rendered in a joint action against all the defendants? and surely there is no greater absurdity in citing as appellee a co-defendant, than in suing a party, who had paid his share of the joint debt.

After the best reflection we have been able to give to this subject, we think ourselves bound to adhere to the decision in the case of *Drew v. Atchison*.

*Appeal dismissed.**

**L. Janin, Grima, and L. Peirce*, for a re-hearing, contended:

1. That they were justified by the jurisprudence of this court in not citing their co-defendants.

II. That any new construction of the law of practice which the court may adopt, should be prospective in its operation, and not be established at the cost of an innocent suitor.

III. That in an action on a simple moneyed obligation, the necessity of making all the obligors parties exists in the lower court only, and not on appeal, where it would be unmeaning, and could produce no effect.

IV. That the proceeding suggested in the case of *Drew v. Atchison*, is unknown to any system of jurisprudence, from which we occasionally borrow; and that the analogous common law process of summons and severance would be dispensed with in a case similar to this, because what has occurred would be considered as equivalent to it.

I. In the case of *Burke v. Erwin's Heirs*, 6 La. 323, the facts were; that the heirs of Joseph Erwin had employed the plaintiff, an attorney at law, to settle the estate of their ancestor. He brought suit against them for a fee of \$5000, and obtained judgment against the heirs for their virile shares. Some of the heirs appealed, others did not, and the court said, in answer to a motion to dismiss the appeal, that the omission "of some of the defendants to appeal, cannot affect the right of the others to do so."

In the case of *Farrar v. Newport*, 17 La. 340, an appeal from a judgment in an action of partition was dismissed, because all the co-proprietors had not been made parties to the appeal. The appellant believed he could rely on the case of *Burke v. Erwin's Heirs*, but the court distinguished between an action of partition, and one on an ordinary moneyed obligation. The different nature of the suits obviously suggested this distinction. If the inferior court should have decreed a partition by licitation, and the Supreme Court should decree a partition in kind, and some of the co-proprietors should not have been parties to the appeal, the two judgments would be in irreconcilable conflict. But in regard to ordinary suits of contracts for the payment of money, the court approves, in the following words, the doctrine of the former case.

"We are not ready to controvert this rule, which, on the contrary, appears to us to be a proper and safe one to adopt for the protection of the rights of the suitors, who, thinking themselves aggrieved by a judgment, would sometimes be without a remedy if their right to appeal was to depend upon the will and disposition of their co-defendants."

These apprehensions, these inconveniencies, are exemplified by the present case. In these remarks which speak to his reason, the practitioner found his guide, and this was the unquestioned jurisprudence of the court until the case of *Drew v. Atchison*.

II. In the case of *Drew v. Atchison*, it was unequivocally held, that an appeal from a judgment, on a joint obligation must be dismissed, if all the obligors are not parties to the appeal.

Of that decision, rendered in October, 1842, at Alexandria, some eight or ten months after this appeal had been taken, not yet printed, and which no doubt the merest accident brought to the knowledge of plaintiff's counsel, the

Duggan v. De Lizardi and others.

defendants and the entire bar of New Orleans, knew nothing. The counsel who addressed the court in behalf of the defence, [Mr. Janin,] was employed in this suit only very lately, and has not to defend himself from the painful imputation of having ruined his clients' cause by an oversight. But such an imputation, if cast upon his predecessors and associates, would be the height of injustice. If the question was doubtful, it was the counsel's duty to ascertain the practice and opinion of the Supreme Court; these he found recorded in *Farrar v. Newport*. Inclining before the learning and authority of that court, his aim and ambition was to follow in its footsteps, and with such a guide he had a right to feel secure. It can hardly be questioned that but for the case of *Drew v. Atchison*, the plaintiff's able counsel would not have made the motion in question; that had this case been argued before the case of *Drew v. Atchison* was decided, such a motion, if met by the authorities now opposed to it, would have been disregarded. The question must have been one of common occurrence, and until that case it never was doubted. While the counsel adhered to the established practice of the court, he could not be charged with neglect or ignorance. "The practice is the law of the court, and as such is a part of the law of the land." Tidd's Practice, Introduction, LXX, and cases there cited. And if the counsel did his duty, his client's right to bring his case before this court on the merits, must be safe.

No law expressly requires what is now insisted on; it may be obscurely deducible from art. 2080 of the Civil Code; but neither this article, nor the cases above referred to, are quoted in *Drew v. Atchison*; and it is, therefore, neither improbable, nor disrespectful to the court, to conjecture that this decision was rendered in the midst of an unparalleled pressure of business, and without that previous preparation and assistance from counsel, which the court has a right to expect, and of which every court is more or less in need.

But whether this last decision be correct, or, as we shall attempt to show, obnoxious to serious objections, it will at least be conceded, that it determines a doubtful point, one as to which this court has doubted, and of which they formerly thought differently. We certainly shall not contest the right of this court, to alter its views, or its jurisprudence, and retract what it may recognize to have been an error. But we respectfully submit, with entire conviction, that in matters of *form*, in matters of *practice*, any alteration in the jurisprudence of the court should be merely prospective in its operation. Thus, in this instance, the court, if adhering to the case of *Drew v. Atchison*, might say, that although they will hereafter dismiss an appeal under such circumstances, yet as this appeal was taken before the decision of *Drew v. Atchison*, as the appellants were probably influenced by the previous decisions of this court, and as the omission complained of cannot affect the merits, they will retain the case.

It is thus this court has not unfrequently expressed itself. Such considerations are familiar to other tribunals of eminent merit and reputation. A contrary course would be equivalent to punishing parties for the mistakes of the

court, and for their confidence in its wisdom. The law does not require, and equity abhors much unnecessary harshness; and we humbly submit, that courts would be unjustifiable in refusing to exercise in such cases, the discretionary power confided to them.

III. Articles 2080, 2081, 2082, of the Civil Code, require all the obligors in a joint contract to be sued together.

The paragraph of which the articles form a part, is taken from the common law; see 1 Chitty's Pleadings 42—44. The very term "obligation conjointe" is unknown to the French law. For the intelligence of this paragraph we may derive help from English and American, but not from French authorities. What is the object of this requisition? As the whole amount of the joint obligation is rateably apportioned among the obligors, their number must be known to ascertain the share of each of them, art. 2080; and according to art. 2082, the obligor who has paid his proportion must be cited, in order that he may recover back the amount he has paid, if the contract should be annulled.

But after judgment and an appeal, the same reasons no longer exist for requiring the appearance of all the obligors, for the contract is resolved into as many judgments as there are obligors. While some of the obligors might appeal, others might compromise with the plaintiff, or refuse to appeal, or allow the delay to elapse without doing so. If one of the appellants should prove, that he was not a party to the contract, the Supreme Court, with all the evidence before it, might increase the contribution of the other appellants without touching those defendants who have not appealed. If one of the defendants should have paid his proportion after the judgment, he would certainly not be permitted to appeal; and although, on the appeal of his co-defendant the contract should be annulled, he could certainly not recover back what he has paid. If nevertheless it should be necessary to make the defendant, who has compromised, a party to the appeal, the absurdity would follow, that the Supreme Court would have to decide upon a matter which is finally settled and beyond its reach, and to render a judgment which could not be executed.

It is easily conceived how an unsuccessful plaintiff can make all the defendants appellees; he clearly has an interest and a power to do so. But a case of joint defendants who are cast in the inferior court, is quite different; if several of them only choose to appeal, can they make their co-defendants parties to the appeal? If parties to the appeal, they must be either appellants or appellees. They cannot be made appellants, for this requires acts to be done by themselves, security, appearance, &c., which their co-defendants, who cite them in, have no right to do for them. To make them appellees would involve a similar absurdity. The appellants would have to execute bonds in favor of their co-defendants, from whom they demand nothing; they would have to pay the costs of their co-defendants, or the bonds are meaningless, and parties united by the same interest would stand opposed in hostile

array. The appellants could not interfere in any settlement between the plaintiffs and their co-defendants, whom they might have attempted to make appellees. They could not have prevented the execution of the separate judgments which the plaintiffs might have obtained against the defendants, thus involuntarily dragged before the Supreme Court. And if these defendants should not appear within a year from the rendition of the judgment, and declare that they join in the appeal, nay, make themselves appellants, can it be doubted that they would be considered, and treated as if they had submitted to the judgment of the inferior court? And if they should appear, and refuse to be parties to the appeal—

After such a declaration, it would not be pretended, that they still would be parties to the appeal, either as appellants or appellees; and if they are not, then, according to the pretensions of our adversary, the appeal must be dismissed, because all the joint obligors are not before the court. In other words, the right of some of them to appeal might be defeated by the refusal of others to join them. These considerations show clearly enough the difference as to the obligors in the court below, and in the Supreme Court, when by the previous judgment of the inferior court their responsibility has been severed, and they have become independent of one another.

Cases of partition, and others in which the object claimed is a *determinate* one, or *indivisible*, require indeed, that all those who have a joint interest should join in the appeal. But they rest upon peculiar principles, different from that which it is now attempted to apply to a claim for a sum of money. The nature of these suits, and of the *subjects involved in them*, renders the execution of a judgment against part of the co-proprietors impossible, without affecting the parties that are not before the court. Not so when a sum of money is claimed jointly from several co-obligors. A judgment in such a case is several; in the case of partition, or in a suit against three for the delivery of a horse, the judgment is joint. In the former case an appeal by some of the defendants, does not suspend the execution of the several judgments rendered against the other defendants. In the latter class of cases, the appeal by *one* defendant suspends the execution of the entire judgment, because it cannot be executed in part, and suspended in part.

IV. The articles which are opposed to us require in terms, the appearance of all the co-obligors only in the lower court. The reasons which the law gives for this requirement—the reimbursement of what may have been paid by one of the obligors, if the contract is annulled, and the necessity of knowing the number of the co-obligors—have been shown to have no existence on appeal, on account of the changed position of the parties. The requirement can therefore not be extended by analogy to the appeal, for the analogy fails. We have also shown the impossibility of making the recusant defendants, in the case under consideration, either appellants or appellees.

But there is another very obvious reason for the appearance of all the co-obligors, to wit: the prevention of separate suits against each of the co-obligor,

on the same matter arising out of the joint contract. And for the same reason, a multiplicity of appeals from one judgment rendered against co-obligors should be avoided. This is the only motive for requiring the appearance of all the co-obligors, or something equivalent to it, on *appeal*. If, then, several out of a greater number of co-obligors against whom judgment has been rendered, should neglect to appeal, how can their co-defendants bring them before the Supreme Court? Not by an abortive attempt to make them either appellants or appellees; but by a process which the common law calls summons and severance, and which is so untechnical, and so obviously indicated by the relation of the parties, that no legislative provision is necessary to authorize us to adopt it; and which ought the more readily to be adopted as the doctrine of joining co-obligors, here discussed, of which it is the necessary complement, has been taken from the common law.

Tidd, in his Practice, vol. 2, p. 1176, says: "If any writ of error be brought in the name of several parties, and any one or more of them refuse to appear and assign errors, they must be summoned and severed; after which the writ may be proceeded in by the rest alone." Ibid. 1169.

Thus, the defendants who do not appeal may be called upon by their appealing co-defendants to declare whether they will appeal or not; and if they neglect to appear, they are considered as having abandoned the appeal, and the court decides the case between the remaining parties.

This rational mode of proceeding avoids all the incongruities into which the plaintiff's suggestions would lead us, imposes no useless hardships, and accomplishes every practical purpose of the law.

We did not resort to this, or a similar process in the present case, for it was unnecessary. Those defendants who have not appealed, have not allowed an entire year to elapse since the original judgment: they can no longer appeal; the case is the same as if on being summoned they had failed to appear, or expressly declared their unwillingness to do so. The multiplicity of appeals against which this provision of the law is intended to guard, is no longer to be feared.

If the proceeding here suggested, should be sanctioned by the court, the requirements of strict law and of enlightened equity would be reconciled. If some of the co-obligors should alone appeal, and the year should not be out, the appeal might be dismissed, and the appellants might yet take out another one, and summon and sever. If the year be out, when the case is called for argument, the non-appearing defendants would be considered as having abandoned the appeal.

The following remarks of Judge Story, in the case of *Todd et al. v. Daniel*, 16 Peters, 523, are singularly appropriate to this case.

"The proper rule in cases of this sort, where there are various defendants, seems to be, that all the defendants affected by a joint decree, (although it may be otherwise, where the defendants have separate and distinct interests, and the decree is several, and does not jointly affect all,) should be joined in the

Duggan v. De Lizardi and others.

appeal; and if any of them refuse, or decline upon notice and process (in the nature of a summons and severance in a writ of error) to be issued in the court below, to become parties to the appeal, then that the other defendants should be at liberty to prosecute the appeal for themselves, and upon their own account; and the appeal as to the others be pronounced to be deserted, and the decree of the court below as to them be proceeded in and executed. In the present case, what has occurred is equivalent to such proceedings. All the defendants originally claimed an appeal; some of them have declined to pursue it at all; others have deserted it since it was pending in this court; and, therefore, there is no pretence to say, that any practical inconvenience can occur from Todd's now prosecuting it alone, since the other defendants have all had notice and declined to interfere, and are content to abide by the original decree."

If this appeal should be dismissed, no other could be taken, for the case was eighteen months on the docket before it could be reached. The dismissal of this appeal is equivalent to an adverse judgment on the merits. It is conceded, that the absence of our co-defendants cannot prejudice the plaintiff, while their presence might have had that effect. It is, therefore, on a purely technical ground only that the defendants would be defeated. No text of our law—no clear analogy—no obvious induction, compelled the court to decree that point as it did. Doubting the wisdom of the recorded provision, as is plainly indicated in the opinion under review, the court had also long doubts concerning its meaning; and when this appeal was taken, its jurisprudence was such as would have supported it.

Neither the common law, still less chancery, would require the dismissal of this appeal; and our law does not deserve the reproach of being more technical and unfeeling for the rights of the citizens than either. The law is not a mathematical science; and a greater or less degree of vacillation is incident to every progressive system of jurisprudence. But we believe that, while it is the duty of courts, when they discover that they have been in error in asserting a principle arising out of the relations or contracts of parties, promptly and manfully to retract it; on the other hand, if it is as to a mere matter of practice that their views are altered, they should inquire whether any real injury has been sustained by the party who denounces the supposed irregularity, and every reasonable facility should be afforded to place the case before the court on the merits. In the practice of the law much is arbitrary; many a point is acknowledged to be so because it has been so decided—It has been so decided because in the absence of positive law the judges had to choose between considerations of nearly equal weight; such a system grows up by successive trials, in which errors are inevitable, and in which the courts and bar mutually assist each other. But no necessity can exist for establishing a point of practice by the ruin of the suitor in whose case it arises.

Re-hearing refused.

The Mayor, &c., of New Orleans v. The Commercial Bank of New Orleans.

THE MAYOR, ALDERMEN, AND INHABITANTS OF THE CITY OF
NEW ORLEANS v. THE COMMERCIAL BANK OF NEW OR-
LEANS.

The interest of five per cent per annum, allowed to the City of New Orleans by section 23 of the act of 1st April, 1833, incorporating the Commercial Bank of New Orleans, is to be calculated on the surplus of the semi-annual dividends on the stock subscribed for by the City, remaining after the payment of the interest on the bonds given to the Bank by the City, and directed to be set apart as a sinking fund. It was not intended, that interest should be calculated on such surplus every six months, and be added thereto, so as to form new capital, bearing like interest. The Legislature did not intend to allow compound interest.

APPEAL from the Parish Court of New Orleans, *Maurian, J.*

De Armas and *Canon*, for the plaintiffs, contended that the plaintiffs were entitled, by the 23d sect. of the charter of the Bank, to compound interest; that it is of the very nature of a sinking fund that the sums appropriated thereto should bear such interest; and that the opposite construction would place the plaintiffs in a worse situation than the other stockholders of the Bank, who, by withdrawing their semi-annual dividends, and re-investing them, could insure interest upon interest.

Eustis, for the appellants.

SIMON, J. The only question presented in this case for our solution, arises out of the interpretation to be given to the 23d section of the charter of the Commercial Bank.

The plaintiffs represent, that, using the right granted to the Corporation of New Orleans by the 21st section of the said charter, said Corporation subscribed for five thousand shares of the capital stock of the Commercial Bank, on the terms and conditions, and in the manner therein provided for; that by the 23d section, it is provided, that *the dividends arising from the shares so owned by the Corporation, shall be applied, first, to the payment of the interest on the bonds given to the Commercial Bank, for the payment of the stock subscribed by the said Corporation; and secondly, that the surplus shall be passed to the credit of the said Corporation, half yearly, at such times as dividends are pay-*

The Mayor, &c., of New Orleans v. The Commercial Bank of New Orleans.

able to other stockholders, to be set apart as a sinking fund, applicable only to the payment of the bonds of said Corporation, when they shall become due; and that the said Corporation shall be allowed an interest of five per cent per annum on the same, by the Commercial Bank of New Orleans. This allegation is an exact copy of the 23d section of the said charter. The plaintiffs complain, that the Commercial Bank has refused to comply with the said 23d section, and to *capitalize*, every six months, the amount of the dividends and interest accrued, and so set apart to form said sinking fund, and to allow any interest on the same. Wherefore they pray, that the Commercial Bank may be ordered and compelled, by all legal means, to comply with the true intent and purpose of the said 23d section, to wit, to settle every six months since the first dividend was made payable by said Bank, the amount and account of all the dividends and interest on the same, deposited in the sinking fund created by the said 23d section, adding progressively the new dividends to the former account, as a new principal; so that at every term, and every six months, a new principal may be formed, consisting of the accumulation of said dividends and interest, the same bearing interest at five per cent per annum up to this day; and for the future, and pending the time for which said Bank was created, at a compound rate, as required by the said act of incorporation.

The defendants plead, that they have fully, and in every respect, complied with the requisitions of their charter.

Judgment was rendered below in favor of the plaintiffs, according to the prayer of their petition; and the defendants, after an unsuccessful application for a new trial, took this appeal.

The accounts rendered by the Commercial Bank have been produced, and they show, that ever since the first dividends, the same were applied, *first*, to the satisfaction of the interest due upon the bonds of the Corporation, and that the balance was always regularly set apart *as a sinking fund*, placed to the credit of the Corporation, with an interest of five per cent per annum on the surplus of the dividends, from the time they were made, and calculated so as to show, every six months, the amount due in principal and interest. No compound interest is allowed, that is to say, the interest is calculated, in the accounts, upon such

The Mayor, &c., of New Orleans v The Commercial Bank of New Orleans.

dividends, in principal, as may have been received up to the time of the payment of each dividend, every six months, and being added to the aggregate of all the dividends, form the total amount of the sinking fund; or, in other words, the surplus of each dividend, carried to the credit of the Corporation, bears interest at the rate of five per cent per annum, from the time the same was made until applied to the payment of the bonds.

It is contended by the plaintiffs' counsel, that under the 23d section of the charter of the Commercial Bank above recited, the City Corporation is not only entitled to the interest of five per cent per annum on the surplus of the dividends, set apart as a sinking fund, during the six months which will have run from the time it has been received, up to the time of the payment of the next dividend; but that, every six months, the whole amount of such sinking fund, composed of the principal and interest, should be *capitalized*, and continue to bear the same interest of five per cent per annum, and so on, to be settled, liquidated, and *capitalized*, every time that a new dividend is paid in.

In support of this position, it has been urged, that the Legislature never contemplated that large sums should remain inactive and unprofitable to the Corporation, during the whole time for which the charter was granted; that the said Corporation would be placed in a worse situation than any other stockholder of the Bank, who, being authorized to receive and withdraw his dividend every six months, is thereby enabled to lay it out at interest as a new capital.

But the question with us is, is the compound interest claimed by the plaintiffs, authorized and warranted by the said 23d section of the charter? By its terms, which appear to us very clear, *the surplus of the dividends* are to be passed to the credit of the Corporation, half yearly, *to be set apart as a sinking fund*, upon which the Corporation is to be allowed an interest of five per cent per annum. Such interest is not to be calculated upon the amount ascertained and liquidated every six months, as contended for by the plaintiffs, but to be allowed upon the surplus of the dividends which are to form, and must be set apart as, a sinking fund, and which, every six months, are to be added to the former dividends. There is nothing in the section under consideration,

nor in any other part of the charter, from which it can be inferred, that the Legislature intended, that besides the interest of five per cent per annum, as allowed by the 23d section, the interest should be *capitalized* every six months, so as to allow to the Corporation half yearly compound interest upon all the preceding *capitalizations* of interest. Such a construction would be against the positive terms of the law, which clearly indicate, that interest shall be allowed in favor of the Corporation, on the surplus of the dividends set apart as a sinking fund, and no further. It is well known, that interest upon interest cannot be recovered. Civil Code, art. 1934; and in the case of *The State of Louisiana v. The Bank of Louisiana*, 6 La. 761, this court held, that no interest could be allowed on the share of profits belonging to stockholders of a bank, though retained among the funds of the bank for a series of years. Here, the plaintiffs have been allowed the interest of five per cent per annum upon their dividends, which are themselves the interest or profit resulting from the stock; and it seems to us, that this ought to be the whole extent or limit of their pretensions, under the 23d section of the charter of the Commercial Bank.

With this view of the question, we think that the accounts exhibited by the defendants have been correctly rendered; that they are in accordance with the provisions of their act of incorporation; and that the inferior Judge erred, in decreeing, that the interest due at every half yearly settlement, should be successively *capitalized*, and added to the sum total of the sinking fund, with interest allowed thereon in the subsequent settlements. The plaintiffs ought to be satisfied with the interest allowed in said accounts.

It is, therefore, ordered and decreed, that the judgment of the Parish Court be annulled and reversed; and that ours be for the defendants, with costs in both courts.

RICHARD M. CARTER v. THE SECOND MUNICIPALITY OF NEW ORLEANS.

Where, after the resignation of his appointment, an attorney who had been employed at an annual salary, continues, with the approbation of his former clients, his attention to the suits which originated during his term of office, and his services are shown to have been useful to them, he may recover compensation therefor.

APPEAL from the Parish Court of New Orleans, *Maurian, J.*

GARLAND, J. The plaintiff claims \$2550, for fees as counsel in various suits in which the Municipality was interested. He obtained a judgment for \$2250, and the defendants have appealed.

It is in evidence, that the plaintiff was appointed the attorney of the Municipality, on the 17th July, 1838, with a regular salary of \$1000 per annum. He resigned on the 25th June, 1839. The suits in which the fees are charged, were commenced whilst the plaintiff was acting as attorney of the defendants. On the resignation of the plaintiff, a successor was appointed; but the plaintiff continued to attend to the cases in question, in conjunction with his successor and another member of the bar, who had been employed to assist them. The plaintiff continued his attention to the cases, until their final decision on appeal. It is proved, that the Finance Committee of the Council of the Municipality, has a general superintendence of the suits for, and against the corporation, and is the proper authority to receive communications from the counsel about suits. The Comptroller and Chairman of the the Finance Committee, testify to this fact. It is shown, that the plaintiff, at different times, spoke and wrote to the officers of the Municipality in relation to these suits, after the dissolution of his official connection with it. The Comptroller, the Secretary of the Council, the Chairman of the Finance Committee, and one or more of the members testify, that they knew he was acting as counsel in those cases. Communications in writing were received, filed away, and some of them published. Bills for expenses incurred in the suits, were paid on the certificate of the plaintiff as to their correctness. When the suits were terminated,

Carter v. The Second Municipality of New Orleans.

the plaintiff reported the result of them to the Council, and no objection was made by any one. Caldwell, a member of the Council, says, that it was his understanding, that the plaintiff was continued as counsel in those suits, although there was no regular resolution to that effect. Peters, who was chairman of the Finance Committee, says, that the plaintiff reported to him, from time to time, the progress of the suits, and that they were of great importance to the defendants. He always thought the plaintiff entitled to compensation, and Caldwell is of the same opinion. The account of the plaintiff was presented to the Council for payment; an opposition was made, but not to the amount claimed, which was vetoed by the Mayor. There is other evidence which shows, that the officers of the corporation knew plaintiff was acting as counsel in the suits mentioned in his account, and no objection was ever made to his doing so. It is shown, that in the two suits with the Carrollton Bank, the defendants paid Mr. Eustis \$2000, for his services, and that the Bank paid its counsel the same sum. Mr. Eustis says, he thinks the charge of \$1000 by the plaintiff, a reasonable one. Mr. Hennen says, that he thinks the charge made for defending the suit of the New Orleans Navigation Company, a reasonable one. He was the counsel for the company, and knew what the plaintiff's services actually were. The fee in the suit for opening streets has been approved, and certified by the commissioners who superintended the whole matter; but as it is not shown, that these individuals had authority to act for the Corporation, or to bind them in respect to the employment of counsel or his compensation, we do not think that item is sufficiently established. The commissioners were not examined as witnesses; nor is the certificate given under oath, or any solemnity entitling it to judicial credence.

The defence is, that the plaintiff was the retained counsel of the Municipality, when all these suits originated. That it was his duty to attend to them. That after he resigned, it was no longer his duty to do so; nor were his services required, as his successor was competent to represent the interests of the Municipality; and that the Corporation did not know and sanction what plaintiff did in the premises.

Mitchell v. Cooley.

It is very clear, that after plaintiff resigned his situation as the regular attorney of the Municipality, he was not bound to continue his attention to the suits originating during his term of office; but he did so with the knowledge and approbation of his former clients. His services are shown to have been useful, and the defendants must compensate him for them. There is no doubt that the counsel, to whom were intrusted the interests of the Municipality after the plaintiff's resignation, were competent to defend them; but it seems to have been understood, that he should continue to aid in the defence and prosecution of the suits. As to the knowledge of the defendants, as to what plaintiff was doing, the proof seems to us conclusive.

The judgment of the Parish Court is, therefore, annulled and reversed, and it is ordered and decreed, that the plaintiff recover of the Municipality No. 2, the sum of one thousand seven hundred and fifty dollars, with legal interest, and costs in the Parish Court, those in this court to be paid by the plaintiff and appellee.

Benjamin, for the plaintiff.

Rawle, for the appellants.

JAMES MITCHELL v. THOMAS JEFFERSON COOLEY.

Where one stipulates in a sale that his vendee shall pay to his vendor a balance of the price yet due, the original vendor may be viewed as merely *adjectus soluti. onis gratia*—entitled to receive, but not to sue for the amount. Not being a party to the contract, he will not be bound by its stipulations, and may continue to look to his own vendee for payment; while, on the other hand, the parties to the agreement may annul it. But if he, in whose favor such a stipulation is made, consents to avail himself of it, he thereby makes himself a party to the contract, which cannot afterwards be revoked without his assent; and he may sue to recover the amount thus stipulated in his behalf.

Doubts as to the construction of a contract cannot avail one, who, not being a party thereto, can base his right to sue in his own name, only on a clear and unequivocal stipulation in his behalf.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Mitchell, pro se.*

Cooley, appellant, contended, that he was not personally bound to the plaintiff, under the act of sale between Robin and himself; citing Pothier on Obligations, No. 57. 3 Delvincourt, 378, note 2. Journal du Palais, (ed. of 1841,) vol. iv. p. 510, (9 Floreal, an. xiii.) Ibid. vol. xv. p. 315, (8th June, 1819.) 20 Duranton, No. 256, or edit. of 1841, vol. xi. p. 143.

MORPHY, J. On the 1st of September, 1835, the petitioner sold to Mrs. Camp, a tract of land, in the Parish of Pointe Coupée, for a consideration which is expressed in the deed of sale, as follows, to wit:

"The present sale is made for and in consideration of the sum of three thousand five hundred dollars, payable as follows: five hundred dollars in cash, which the vendor acknowledges to have received to his satisfaction; five hundred dollars payable in one year from this day; and the remaining two thousand five hundred dollars, being appropriated to meet the rights of the minor children of the vendor, are to remain on interest, the principal to be payable as the mortgage of the said minors is diminished or released, and the interest to be paid half-yearly in advance, at the rate of six per cent per annum, &c. The property herein above described and sold, remaining specially, and, by privilege, mortgaged and hypothecated, with confession of judgment, to secure the payment of three thousand dollars, as also the interest herein above stipulated to be paid."

On the 24th of August, 1836, Mrs. Camp sold the property to L. Daigre, who assumed her obligations in relation to the \$2500.

On the 31st of May, 1837, Daigre sold the same property to A. Robin, who assumed his vendor's obligations concerning the sum of \$2500, in the following terms:—"Le sieur Robin devra payer et payera comme il promet de le faire ici, au sieur Mitchell, ou a ses ayant-cause, la somme de deux mille cinq cents piastres en capital et intérêts, ainsi et de la même manière que s'y est engagée la dame Henry S. Camp par l'acte du premier Septembre précité, auquel acte les parties se réfèrent; le dit sieur Robin prenant la réversion de l'hypothèque qui assure ce paiement."

On the 30th of March, 1839, Robin sold to the present defendant, Thomas J. Cooley, who assumed an obligation touching the aforesaid sum of \$2500, in the following words:—"La présente

vente est faite pour la somme de cinq mille cinq cents piastres, que le sieur Cooley promet payer, savoir : 1^o deux mille cinq cents piastres en l'acquit du vendeur et de ses vendeurs antérieurs aux enfans mineurs du sieur J. Mitchell, ainsi et de la manière que s'y est obligé le vendeur par l'acte du 31 Mai précité, auquel les parties se réfèrent; le dit sieur acquéreur se mettant au lieu et place du dit sieur vendeur, prenant la reversion de l'hypothèque qui assure le paiement de la dite somme."

On the 24th August, 1841, the defendant sold the land to his brother, Ebenezer Cooley, who assumed the like obligations, in relation to the sum of \$2500.

James Mitchell, Jr., one of the plaintiff's four surviving children, having become of age on the 1st of October, 1841, the plaintiff demanded of the defendant the payment of \$625, being the portion accruing to the said James Mitchell, Jr., out of the sum aforesaid of \$2500; and, at the same time, tendered to him a receipt of his said son, under private signature, of the following tenor, to wit:

"New Orleans, 28th October, 1841.

"Received from my father, James Mitchell, six hundred and twenty-five dollars, being for my share, or part, in the estate of my late mother, deceased, and in full of all claims or demands against my said father; and I do hereby release any and every mortgage, right, or privilege, I have on the property of my father, authorizing and empowering all and every Recorder or Keeper of Mortgages to release and cancel the same, and especially the mortgage or privilege I have on a property situated in the Parish of Pointe Coupée, sold by my father to Mrs. Amelia Camp, and afterwards purchased by the Honorable Thomas Jefferson Cooley.

"JAMES MITCHELL.

"ED. GARDÈRE, Witness."

On the refusal of the defendant to pay, the present suit was brought to recover the said sum of \$625, with interest, at six per cent per annum, from the 1st of September, 1841, together with \$75 for the semi-annual interest due at the same date.

The defence set up is: 1st. That the defendant is not personally bound to the petitioner, under the act of sale of Robin to

him ; that he only bought the property, subject to the payment of the \$2500, due to the minor children of the petitioner ; and that, as he has sold the same to E. Cooley, the petitioner must look to the property in the hands of the present owner. 2d. That if the defendant is personally bound in the same manner as Mrs. Camp, the original vendee, the plaintiff has not complied with his contract, or the *condition precedent* of releasing or reducing the mortgage of the minors on the property, so as to entitle him to claim the portion of the price he now sues for. 3d. That there exists on the property a tacit mortgage, resulting from the natural tutorship of the plaintiff of his minor children, for the amount of their rights in the succession of their grandfather, Benjamin Jewell, Sen., by representation of their mother.

In the several sales which preceded that of Robin to the defendant, the personal obligation to pay the \$2500 to the plaintiff, as original vendor of the property, is expressed in unequivocal terms. These successive sales did not deprive the plaintiff of his right of looking to either of the purchasers, thus personally bound, so long as he had not accepted one of them as his debtor, in lieu of his original vendee. Although the clause in the sale to defendant is not so explicit as in the preceding sales, yet it implies, in our opinion, a personal obligation. It has been contended, that it contains no stipulation, *pour autrui*, which, when accepted, entitles the obligee to an action against the defendant, but merely constitutes such obligee an *adjectus solutionis gratia*, as known to the Roman law, who has a right to receive the money, but cannot sue for it, as he does not, by such a clause, become a creditor. We cannot acquiesce in this view of the subject. When a person stipulates in a sale, that his vendee shall pay to his vendor a balance of the price yet due, the original vendor, who is thus delegated to receive such amount, may, to be sure, be viewed as being *adjectus solutionis gratia*. Not being a party to the contract, he is not bound by the stipulation ; and he may continue to look to his own vendee for payment. On the other hand, the parties to the sale may annul and destroy the agreement, but if the person, in whose favor such a stipulation is made, consents to avail himself of it, he thereby makes himself a party to the contract, which cannot afterwards be revoked without his assent,

and he can bring suit to recover the amount thus stipulated in his behalf. Code of Practice, art. 35. Civil Code, art. 1844. 6 Toullier, Nos. 150 and 153. Pothier on Oblig. Nos. 58, 71, and 480. 2 Mart. N. S. 672. 6 Ib. N. S. 152. 5 La. 316. 15 La. 184. 17 La. 60. But while we consider the obligation of the defendant to pay the \$2500 as a personal one, it appears to us to have been entered into by the defendant, not in favor of the petitioner, but of his minor children. If such be the case, the petitioner would be without any right of action in his own name. The assumption of the defendant differs widely from that of the prior purchasers. While the latter bound themselves to pay into the hands of the plaintiff, the money appropriated to meet the rights of his children, the defendant thought proper to bind himself to pay it to the minors themselves. His object might have been the better to protect himself, by receiving directly from each of the minors, on his becoming of age, an acquittance and release of the mortgage, for the portions of the money respectively paid to them. This construction is warranted by the plain import of the words used in the sale. If any doubts should result from the whole context of the clause of assumption, considered in connection with the prior sales to which it refers, such doubts cannot avail the plaintiff, who, not having been a party to the contract, can base his right to sue in his own name, only on a clear and unequivocal stipulation in his behalf. The circumstance of the semi-annual interest having been paid to the plaintiff, during the time the defendant was in possession of the land, can have but little or no weight, as the defendant could pay the interest due on the minors' money to no other person than their father and natural tutor. This view of the subject renders it unnecessary to examine the other questions presented by the record.

It is, therefore, ordered, that the judgment of the Commercial Court be avoided and reversed, and that the plaintiff's petition be dismissed, with costs in both courts.

Deaver v. Bedford and another.

LARKIN DEAVER v. GEORGE BEDFORD and another.

The consignees of a vessel, who receive goods belonging to a third person residing in another place, and re-ship them by a steamer to him, will not be responsible for any loss resulting from a fortuitous event, as the snagging of the steamer, where compensation is claimed only on the ground, that the goods should have been re-shipped sooner, and not for the omission to insure.

The consignees of a vessel are entitled to take charge of goods shipped by her, on which they have a lien for freight, drayage, and the expenses of storing. The best means of notifying the owner, is by advertising them.

APPEAL from the Parish Court of New Orleans, *Maurian, J.*

Durell, for the appellant.

Lockett and *Micou*, for the defendants.

MARTIN, J. The defendants, as consignees of a ship which arrived at New Orleans, received goods which had been shipped for the plaintiff, who resides at St. Louis, and sent them to him by a boat from that town, the master of which stated, that he was requested to bring such goods as might be in New Orleans for the plaintiff. The boat was lost on the way; and the present suit was brought for the value of the goods, on the ground, that the defendants, as *negotiorum gestores*, had been guilty of a gross neglect in keeping the goods a long time, without apprising the plaintiff of their arrival. There was a judgment for the defendants, and the plaintiff appealed.

It does not appear to us, that the court erred. The loss of the goods was in consequence of a fortuitous event—the loss of the boat by its running on a snag. This was not attributable to any neglect of the defendants, in not sending the goods sooner, for the risk of the voyage must have been the same on an earlier one. Damages are not claimed for the neglect to make insurance, for the word insurance is not to be found in the whole record, nor appears to have been uttered below. Had such a claim been made, the plaintiff ought to have accompanied it with some evidence of the usage of commerce in New Orleans, as to goods sent up the river by steamboats. But there is not a tittle of evidence on that head. As the neglect to insure was not urged, it

Castaing v. The New Orleans Improvement and Banking Company and others.

would have been improper in the inferior Judge to have considered it. On the arrival of the goods in New Orleans, the defendants, though they were not the consignees of them, correctly took them, as consignees of the ship, as the consignor of her had a claim for the freight which his consignees were bound to enforce. The charge which they took of them, occasioned costs of drayage, storage, &c., which were superadded to the freight, and formed a lien on the goods. The defendants took the best means they could, to inform any friend the plaintiff might have had in New Orleans, of the arrival of the goods, by advertising them. They do not appear to have had any proper opportunity to part with the goods, till that which was offered by the master of the boat, by which they sent them. It is in evidence, that the plaintiff had desired the latter to bring up any goods of his which might be in New Orleans.

Judgment affirmed.

FRANÇOIS CASTAING v. THE NEW ORLEANS IMPROVEMENT AND BANKING COMPANY and others.

The lessee of a part of a building, in which, by the regulations of the lessors, sales at auction were to be made, cannot maintain an action against a Sheriff for making his sales in another apartment leased for another purpose, nor against the lessor of such apartment, who is not shown to have received any remuneration for allowing such sales, and between whom and the plaintiff no privity exists.

APPEAL from the District Court of the First District, *Buchanan, J.*

Destix, for the appellant.

Marsoudet and *Ducros*, for the defendants.

BULLARD J. The character of this action is sufficiently explained in the judgment lately rendered in the same case, *ante*, p. 177, on an appeal by the plaintiff from a judgment sustaining an exception of the Bank. The case, so far as it concerns the other defendants, *Ducros* and *Alvarez*, was submitted to a jury, whose verdict was for the defendants; and for a judgment pronounced thereon, the plaintiff prosecutes the present appeal.

Cleary v. The Second Municipality of New Orleans.

If Ducros had conducted his Sheriff's sales in the street, it is clear the lessee of the Rotunda of the St Louis Exchange, would have had no right of action against him. The jury appear to have thought he had an equal right to do so in the coffee room, and we are not prepared to say that they erred.

It is not shown that Alvarez received any remuneration from the Sheriff for permitting the sales, and there is no privity between the plaintiff and him. If Castaing had permitted auctioneers to give refreshments to their bidders in the Rotunda, Alvarez would perhaps have no right to complain, although the latter kept the bar in the vestibule. Whether it was the duty of the lessors to maintain their own regulations, is a question yet to be settled. But it is difficult to see on what ground an action can be maintained by the plaintiff against a public officer, for not making his sales in the Rotunda, or against the lessee of the vestibule, for not preventing it.

Judgment affirmed.

PETER CLEARY v. THE SECOND MUNICIPALITY OF NEW ORLEANS.

The obligation of the plaintiff in a *fi. fa.*, to refund to the purchaser on his eviction, the money received by the former, is merely statutory, (C. P. 711, *et seq.*) and it cannot be extended further than to the reimbursement of the price paid by the purchaser, and received by the plaintiff, or which might have been received by him but for his own neglect; but the purchaser may recover from the defendant in the execution, the whole sum paid by him. He is entitled to a joint action against both the parties to the execution—against the plaintiff, for the amount received by him, and against the defendant, for the whole sum paid.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Lockett, Micou, and L. Peirce*, for the appellant.
Rawle, for the defendants.

MARTIN, J. The present defendants having instituted a suit against the unknown owners of a lot, for the expenses of the *banquettes* before it, and obtained judgment for \$106, Cleary became the purchaser of it, at a Sheriff's sale, for \$1700, and was evicted

by Hodge, the owner, on grounds not unlike those set forth in *Carmichael v. Aikin*, 13 La. 205. Although the judgment on which the lot was sold, was for \$106 only, Cleary paid to the Marshal, the whole price for which it was adjudicated to him, and now seeks to recover it from the defendants, who were the plaintiffs in the original suit. There was judgment against them for \$120, and the plaintiff has appealed. The defendants have prayed for a judgment in their favor.

The counsel for the plaintiff have contended that he was entitled to a judgment for the value of the lot, under the authority of the case of *Lambeth v. The Mayor et al.*, 6 La. 731.

It does not appear to us, that the First Judge erred, in expressing the opinion that the obligation of the plaintiff in a *fi. fa.*, to refund to the purchaser, on his eviction, the money which the former received, is merely statutory. Code of Practice, arts. 711, *et seq.* In the case last cited this court held, that his obligation went no farther. "The responsibility established by the Code of Practice against seizing creditors cannot be extended further than the reimbursement of the price paid by the purchaser, *and by them received.*" The counsel of the plaintiff and appellant have urged, that the code, art. 711, recognized in the purchaser, evicted from the thing adjudged to him on the ground that it belonged to another person than the party in whose hands it was taken, the right of "recourse for reimbursement against the seized debtor and the seizing creditor; but upon the judgment obtained jointly for that purpose, he shall first take execution against the debtor, and upon the return of such execution, *no property found*, he may take out execution against the creditor." On this the counsel has strenuously urged, that the right of the purchaser to be reimbursed, even against the plaintiff in the *fi. fa.*, extends to every thing which the former has paid; and that he is entitled to a joint judgment against the plaintiff and defendant in the *fi. fa.*, although the execution of that joint judgment cannot be taken against the former, until one against the latter be returned, *nulla bona*. The counsel for the defendants and appellees has, on the contrary, contended, that the reimbursement which the code speaks of, is the reimbursement which each of the parties to the *fi. fa.*, is bound to make, *id est*, the plaintiff of what he has received, and the de-

Frazier and another, Receivers, &c. v. Dick and others.

fendant of what has been received by the plaintiff and him ; that the argument resulting from the code's speaking of a joint action, assumes the position, that in all such actions, the parties are liable for a virile portion of the judgment which is incurred ; for, the joint debtor who has paid his portion, must be made a party on account of the interest he has in the *repetition* of his payment, if the contract be disproved or annulled, though no judgment can be had against him. Civil Code, arts. 2081, 2082. He urges, that the purchaser is entitled to a joint action against both parties to the execution, *id est*, against the defendant for the whole sum paid by the purchaser, and against the plaintiff for that sum which he received. It was in this way that art. 711, of the Code of Practice was construed in the case cited, and we see no reason to be dissatisfied therewith.

It has not appeared to us, that the judgment appealed from ought to be amended in favor of the defendants and appellees, on the ground that they never received from the Marshal the \$106, to which they were entitled*, and thus relieve them from the obligation of reimbursing that sum to the purchaser, by whom it was paid at their instance and request, and which they evidently failed to obtain through their own negligence and delay.

Judgment affirmed.

WILLIAM WEST FRAZIER and another, Receivers, &c. v.
JAMES DICK and others.

The holder of a bill of exchange, is under no obligation to use active diligence in suing an acceptor, or any other party. He may remain passive, and forbear to sue as long as he pleases ; but he must not agree to give time to an acceptor, so as to preclude himself from suing, and thus suspend his remedy against the latter, to the prejudice of the drawer and endorsers. To make an agreement for indulgence ob-

* It was admitted that the Municipality had never received any part of the funds made on the execution—not even the amount of their judgment.

Frazier and another, Receivers, &c. v. Dick and others.

ligatory, it must be for an adequate consideration. A delay, without sufficient consideration, and without taking any new security, being *nudum pactum*, will not discharge the other parties. Nor will they be discharged where the agreement, though obligatory, was made with their consent.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Peyton, J. W. Smith, and T. Slidell*, for the plaintiffs.

L. Peirce and Eustis, for the appellants.

GARLAND, J. The defendants are sued as the endorsers of four promissory notes, drawn by Christmas & Norfleet, for \$26,000, two of them payable in March, 1841, and the other two in March, 1842. There was judgment against them for \$8000, with interest, being for the balance owing on the two first mentioned notes, and in their favor for the two last; it not appearing that they were presented for payment at maturity, protested, and notice given according to law. From this judgment, the defendants have appealed.

The defence rests on an exception, that the plaintiffs have no right to sue on the notes, their capacity of receivers not being legal, and their appointment not conferring any authority. On the merits, they admit, that their signature is genuine, but aver, that no notice of protest was ever given them. They allege, further, that they are discharged by the plaintiffs, or the Bank of the United States, under which they claim, having, without their consent, made arrangements with the drawers, and given them an extension of the term of payment.

The exception, as to the capacity and authority of the plaintiffs to sue, was, we think, correctly overruled by the court. The question has been definitively settled in the case of *Frazier and another, Receivers, &c. v. Wilcox and another*, recently decided in this court, 4 Robinson, 517.

The evidence of protest, and notice thereof to the defendants, on the two notes due the 1st—4th March, 1841, is very satisfactory. The notes due one year after, appear not to have been protested at all; the defendants were, therefore, properly discharged as to them.

The question, whether time was given to the drawers of the notes, without the assent of the endorsers, is the principal one in the cause. The law in relation to extending the term of payment

Frazier and another, Receivers, &c. v. Dick and others.

to the drawer of a note, without the consent of the endorser, and the consequences of such an act, was, after much deliberation, settled in the case of *Huie v. Bailey*, 16 La. 213. We then said, p. 218, "there is no obligation of *active diligence* on the part of the holder, to sue the acceptor, or any other party, and he may be *passive* and *forbear* to sue, as long as he pleases; but he must not so *agree* to give time to the acceptor *as to preclude himself from suing him, and suspend his remedy against him*, to the *prejudice of the drawer and endorsers*. To make any agreement for indulgence obligatory, it must be for an adequate consideration. Chitty on Bills, 8th Am. ed. 441, 442, 443, 446. 3 Kent's Com. 2d ed. 111, 112. The old opinion was, that any agreement to give time, discharged the drawer and endorsers, whether without consideration, or not; but the later doctrine is, that a delay *without sufficient consideration*, and without taking any new security, being *nudum pactum*, will not discharge other parties, if the holder has not entered into such an agreement, as will disable him from suing the acceptor. Chitty on Bills, 447." It may, therefore, be considered as well established, that the giving of time must be in such a manner or form, as will prevent the holder from suing or prosecuting an action, previous to the expiration of the stipulated period. It must be without the assent of the endorser, and for a sufficient consideration. The application of these principles, must depend upon the facts of each case. Let us now see the effect they will have on the one before us.

The Bank of the United States, being the holder of the notes sued on, one of the drawers applied to Frazier, the agent of the Bank in Mississippi, where the drawers resided, to receive payment in the notes of the Agricultural Bank of that State, which said agent agreed to receive, if paid on or before the 20th of March, 1841. On the 19th March, Christmas, the drawer, who had made this arrangement, writes from Vicksburgh to Caruthers & Co., in New Orleans, saying, that Norfleet & Christmas were owing a debt due on the 1st—4th of that month, at the Merchants Bank, in that city, which belonged to the United States Bank, and that Frazier, the agent, had agreed to receive payment in the notes of the Agricultural Bank, if paid on or before the 20th. He then says: "I wish you to see the Bank immediately, and get the time

Frazier and another, Receivers, &c. v. Dick and others.

extended; say thirty days." On the receipt of this letter, Caruthers went to the Bank, and applied to the Cashier, from whom, he says, he could get no information. Afterwards, he saw the President, who told him, that he knew nothing of the arrangement made by Frazier, but that an indulgence of thirty days would be extended, and the notes of the Agricultural Bank received in payment, at their market value, on the 20th of March, 1841, which was a discount of from twenty-seven to twenty-eight per cent. The precise day is not shown, on which this transaction took place, but it was on or previous to the 24th of March, 1841. The witness says, that he has no knowledge as to the defendants having any knowledge of this arrangement; but Frazier being examined as a witness, says, that Christmas, and Hill, one of the defendants, partners in a commercial firm, being at Vicksburgh, he was induced to recommend to the Merchants Bank in New Orleans, the course he thought it best to pursue, for the interests of the Bank of the United States; and in the first instance, advised that the Agricultural Bank notes should be received at par. Some misunderstanding occurring about this, he, witness, wrote to the Bank to accept payment in them, if offered within a certain number of days. He had no power to make a definite arrangement, as he was not the agent for these notes. He says, that Hill conversed with him from time to time about this business, was very anxious that the notes should be paid, and never expressed any disapprobation. He always considered Hill as the acting partner of the defendants in Mississippi; and treated with him as such, in relation to the business with the Bank of the United States. He thinks, that Hill was cognizant of what was passing between Christmas and himself—is sure he was, as they often spoke of it, and never heard him make any objections. The evidence goes much into detail, but we have stated the leading facts; and the impressions which they, with the body of the testimony, make on our minds, is, that the object of the debtors was as much to induce the holders of the notes to receive payment in depreciated paper, as to get time; and that Hill, one of the defendants, was cognizant of the whole transaction.

In this case, it has been said, that the assent of the defendants

The State v. Desforges and others.

to the arrangements made with Christmas, has not been shown. It appears to us very doubtful, whether the contract entered into, was such a one as would have prevented a suit being brought on the notes before the 20th of April, 1841; but if it were, we think it is shown that Hill assented to it. He never expressed any dissent, when the arrangements were the subject of conversation in his presence, which raises a strong presumption of consent. The arrangement appears to have been entirely for the accommodation and benefit of the debtors. At any rate, they have not shown, that it was the interest of the Bank of the United States to have accepted the notes of the Agricultural Bank, instead of their own notes, or specie.

Judgment affirmed.

THE STATE v. ADOLPHE DESFORGES and others.

In an action in the name of the State to recover the penalty of a bond taken for the appearance of one of the obligors, the defendants may urge, for the first time, after appeal, that nothing became due to the State by its forfeiture. *Per curiam.* Such an objection is not based on the mere incapacity to sue, which must be specially denied, but, tending to show the absolute want of any legal right in the State, may be taken advantage of at any stage of a cause. It goes to show that the plaintiff has no interest in the subject matter of the suit, and that the right of action does not belong to the party who seeks to enforce it.

Under the 4th section of the act of 1 April, 1835, bonds or recognizances taken by a Recorder of any Municipality of the city of New Orleans, in a criminal matter, can only be recovered by the city attorneys for the use of the corporation. From the moment of forfeiture, the corporation was vested with the right to sue for their recovery. The Attorney General cannot enforce the payment of such a bond, in the name, and for the benefit of the State. An action for the recovery of the bond is a civil proceeding; and one cannot be permitted to sue to enforce obligations in which he has no interest.

The 4th section of the act of 1st April, 1835, appropriating to the city of New Orleans the amounts recovered on all bonds and recognizances taken by the associate Judges of the City Court, the Mayor, or Recorder, within that city, for the public peace, or in criminal matters generally, and directing how they shall be sued on, was not repealed by the act of 11 March, 1837, chap. 73, providing for the support of the Charity Hospital.

APPEAL from the Criminal Court of the First District, *Canonge, J.*

Preston, Attorney General, for the State. The fourth section of the act of 1st April, 1835, (Acts, p. 179,) must be considered, as referring to recognizances taken by the City Magistrates, for criminal offences against the City regulations : as an act, passed the very next day, (April, 2d—see Acts of 1835, p. 219,) provides, that all fines and penalties whatever incurred by persons bound over to appear before the Criminal Court of the First District, shall be prosecuted before it by the Attorney General. The act of 1st April, 1835, p. 179, was repealed by the act of 11th March, 1837, chap. 73, providing for the support of the Charity Hospital.

Bodin, for the appellants. The State cannot recover on the recognizances sued on, because nothing became due to it by the forfeiture ; and nothing being due to the State, the Criminal Court of the First District has no jurisdiction to enforce the payment of the bond.

Whenever the condition of a recognizance is broken, it becomes forfeited or absolute, says Blackstone, and being estreated or extracted from among the other records, and sent up to the Exchequer, the party and his sureties, having now become the king's absolute debtors, are sued for the several sums in which they are respectively bound. 4 Black. 253.

The words of the great commentator are especially applicable to this case. By the non-appearance of Desforges, the recognizance of the appellants was forfeited ; and it remained only to extract it from the Recorder's records, for the purpose of suing the parties who had become the absolute debtors—of *whom* ?

Not of the State of Louisiana ; for, by an act of April the 1st, 1835, entitled " an act supplementary to the several acts relative to the City Court of New Orleans and for other purposes," (see p. 179 of the Acts of 1835,) it is declared, section 4th : " That all bonds and recognizances taken by the Associate Judges, Mayor, or Recorder, within the City of New Orleans, for the public peace, or in criminal matters generally, shall, when forfeited, be recovered by the City Attorneys, for the use of the Corporation of New Orleans, all laws to the contrary notwithstanding."

The bond, given in this case, when once forfeited, became, therefore, the property of the Corporation of New Orleans, which alone could sue to recover its amount. It is useless to remark that by the act of division of the City, the three Municipalities have succeeded to the rights of the old Corporation; the position of the parties not being affected by that.

There are many acts of our Legislature by which forfeitures are thus given to public institutions, or political corporations. The right to sue for the forfeitures is not invariably conferred on the grantee; but, in several instances, it has been expressly given, such as in an act of 1842, section 9th, page 484 of the vol. of the acts of that session. The present case is another example of that legislative grant, by which the State gave up even the right of recovery.

By what authority, then, did the Attorney General present himself, in this case, in the name of the State, and for the benefit of the State? The State has passed over its interest in such bonds, to the City of New Orleans; the City is to recover the whole amount of the bond, and the City Attorneys must sue for the recovery thereof.

The action, to be brought on the recognizance given by the appellants, is a civil proceeding, (14 La. 195, and 12 La. 511,) to which none can be a party except he who is interested therein. (2 Mart. N. S. p. 254, *et seq.*)

If it were necessary to consult English authorities on the subject, I could appeal to Bacon's Abridgment, to Blackstone, to the case of *Adams v. Wood*, (2 Cranch,) and the case in 3 Sumner, 120, wherein it is laid down, that "the action to recover a penalty, or forfeiture, must be brought in the name of government, *unless* some other mode for the recovery is prescribed by the statute." Here the statute is clear and positive; it says that the forfeited bond "*shall* be recovered by the City Attorneys, for the use of the City."

An observation of Judge Bullard, in the late case of *The State v. Williams*, may be likewise invoked: "I do not see how an action of debt could be maintained *by the State* for the whole fine, when half is given to the informer."

Upon the first point, we must, therefore, conclude, that the

State could not maintain this action, wherein, not the one-half merely, but the whole amount of the forfeiture is given to another; and when the State itself has prescribed, that the recovery shall be made by its grantee.

Upon the second point, the conclusion is greatly facilitated, since we have already shown, that the bond, when forfeited, shall not belong to the State.

The Criminal Court of New Orleans, where this suit was brought, is a court of limited jurisdiction, "to hear and determine all prosecutions, upon all crimes, misdemeanors, and offences whatever, which have been, or shall be committed, by any free person within the limits of the First Judicial District." (Act of 3d March, 1819.)

In 1832, its jurisdiction was enlarged, so as to extend to "all cases where it may be necessary to enforce the payment of any sum due to the State for the forfeitures of bonds and recognizances in criminal prosecutions." See acts of 1832, p. 98. But the jurisdiction is given only "to enforce the payment of sums *due to the State*," and if nothing is due to the State by the forfeiture of the appellants' bond, the Criminal Court of New Orleans was without jurisdiction to enforce the payment thereof.

The act of 1837, (p. 98 of the sessions acts,) can have no reference to the present case.

That act establishes a mode of proceeding by the Criminal Court, and all the other courts of the State, for the recovery of the amount of bonds, forfeited in consequence of the non-appearance of the accused before their own bar, and in cases wherein the State is entitled to the recovery, or the recovery at least is left to the Attorney General, representing the State.

The provisions of that act do not clash with the provisions of the act of April 1st, 1835. By the latter, a particular class of bonds shall be recovered at the suit of the City Attorneys; by the former, other bonds are legislated upon. As a proof that such is the intention of the law-giver, we must recollect that the act of 1837, is nothing more than a modification of the proceedings established by an act of 1835, (p. 219 of the vol.) passed on the 2d of April, that is to say, the *next day* after the act by which the right to certain bonds, taken by its officers, is given to the City.

These two acts can stand together, and the last contains no general repealing clause.

Whenever a bond has been taken (not by the City Court Judges, Mayor, or Recorder,) the amount of which is to be recovered by the Attorneys, representing the State, the mode of proceeding to be followed, is established by the act of 1837. Before that, what was the mode? The act of 1835, did not decree the forfeiture to be absolute; but decreed it to be "similar to what is known in the common law under the term of *estreat*, to serve as a foundation against the accused and his surety, for a *scire facias*." 10 La 102. Now, under the changes operated by the act of 1837, a judgment is entered up at once against the parties to the bond.

But if the recognizance has been taken by any of the City Court Judges, or by the Mayor, or Recorders, the proceedings are quite different.

The State, in the first place, must cause the bond to be declared forfeited; because this is a criminal proceeding, which, by the constitution, must be carried on in the name of the State.

But the recovery of the bond after it is declared forfeited, is another thing; and the proceeding has been decided to be a *civil* one. "When the forfeiture of a bond has become a matter of record," says Judge Martin, in 12 La. 528, "it may be put in suit in the ordinary way, and perhaps in no other."

The city of New Orleans, which is the true *recognizee* in such cases, after the State has done its part, by causing the bond to be declared forfeited, must sue upon it by its Attorneys, in conformity with the 4th section of the act of April 1st, 1835, by an ordinary action, before the ordinary tribunals of the country, clothed with general jurisdiction.

Eustis and *Grymes*, on the same side.

*SIMON, J.** *Castera* and *Andry*, two of the defendants, are appellants from a judgment on a bond taken by the Recorder of the Second Municipality of New Orleans, for the appearance before him of *Desforges*, their principal, on a charge of having embez-

* This case was decided on a re-hearing.

zled, and converted to his own use, funds of the Commercial Bank of New Orleans.

The petition states, that the bond sued on was taken by the Recorder; and that, by reason and in consequence of the non-appearance of Desforges, before said Recorder, to answer the complaint lodged against him, and of his departure from the State without the leave of said Recorder, the same was forfeited, and the parties thereto "became all liable and responsible to the State," &c.

The appellants filed several exceptions, among which we find the following plea: "that the Criminal Court is without jurisdiction, special laws having been enacted, determining the mode of proceeding and the extent of jurisdiction of the Criminal Court for the recovery of the amount of bonds, obligations, and recognizances due to the State in criminal cases, and said special laws not justifying, nor in any manner authorizing the mode of proceeding in this case, nor giving jurisdiction to this court."

Under this plea, it has been urged by the appellant's counsel: 1. That the State cannot recover on the recognizances sued on, because nothing is due on it to the State by its forfeiture: and 2d, That nothing being due to the State, the Criminal Court is without jurisdiction to enforce the payment of said bond.

This position of the appellant's counsel, does not appear to have been taken below, except so far as it denies the jurisdiction of the Criminal Court; but the question, though not perhaps strictly presented by the pleadings, seems to be one of those, which, tending to destroy the plaintiff's action, or rather to show his absolute want of legal right, may be taken advantage of at any stage of a cause. It is not based upon a mere want of capacity to sue, which is to be specially pleaded or denied; but it is an attempt to establish, that the plaintiff has no interest whatever in the subject matter of this suit, and that the right of action does not belong to the party who seeks to enforce it. *Brown and Sons v. Saul et al.*, 4 Mart. N. S. 487. Here, the petition alleges, that the parties to the bond became all liable and responsible to the State, and if it be true that the State has no interest in the matter in litigation, it is clear that no recovery can be had at the suit of the Attorney General.

The appellants' counsel relies upon the 4th section of an act of

the Legislature, approved 1st of April, 1835, p. 179, which provides: "that all bonds and recognizances taken by the Associate Judges, Mayor, or Recorder, within the city of New Orleans, for the public peace, or in criminal matters generally, shall, when forfeited, be recovered by the City Attorneys, for the use of the Corporation of New Orleans, all laws to the contrary notwithstanding;" and he maintains that the bond, given in this case, when once forfeited, becomes the property of the Corporation of New Orleans.

This is not the only instance in which forfeitures are given by the Legislature, to public institutions, or political corporations. In some cases they are allowed the benefit of the fines and forfeitures, without having the right to sue for them; but in others, they are specially authorized to sue for their recovery, in their own corporate names. So, under a law of 1842, (acts of that year, p. 484,) all fines and forfeitures incurred under the act, are to be recovered in the name of the Police Jury of the parish of Concordia, before the Parish Judge; and so, in this case, the bond or recognizance sued on, having been taken by a Recorder within the City of New Orleans, in a criminal matter, is to be recovered by the City Attorneys for the use of the Corporation. It is obvious, therefore, that, from the moment that the bond was forfeited, the Corporation became vested with the right to sue for the recovery of its amount through its attorneys, whose duty it was to institute proceedings for that purpose, for the use of the said Corporation; and it is clear that the Attorney General could not enforce the payment of the bond, in the name and for the benefit of the State.

We have been referred to several authorities in support of the position taken by the appellants' counsel, which appear to sustain it. In 3 Summer, 120, it was held, that "the action to recover a penalty or forfeiture must be brought in the name of the government, unless some other mode for the recovery is prescribed by the statute." See also *Adams v. Wood*, 2 Cranch, 336. Here the mode is prescribed by the statute; its terms are clear and positive, and exclude the idea of the action's being brought in the name of the State, for the recovery of the bond which the appellants may have become liable to pay to the Corporation of New Orleans. It cannot be disputed that the action to be instituted

for the recovery of the recognizances given by the defendants in this suit, is a civil proceeding. Its forfeiture having become a matter of record, may be put in suit in the ordinary way. 12 La. 538. 14 La. 195. And it is a well known rule, that no one can be permitted to institute suits at law, to enforce obligations in which he has no concern. 2 Mart. N. S. 254.

It has been urged that the act of 1835, which confers on the City Corporation the power of collecting and receiving the amount of the bonds and recognizances taken by the Recorder in criminal matters, was evidently repealed by the special statute of 1837, p. 73, requiring all sums paid into the State Treasury from forfeited bonds and recognizances to be set apart, to the extent of \$40,000 per annum, for the permanent support of the Charity Hospital. This act contains no repealing clause, and does not seem to refer to the law relied on by the appellant's counsel (of the 1st of April, 1835.) This last law provides for a limited and special class of bonds and recognizances, to wit, such as are taken by the Associate Judges, Mayor and Recorder, within the City of New Orleans; whilst the disposition of the bonds and recognizances taken in the other parishes of the State, including those taken in the other parishes of the First Judicial District which are within the territorial jurisdiction of the Criminal Court, remain unchanged, and are to be recovered under the provisions of two other acts of the Legislature, approved the 2d of April, 1835, (Acts of that year, p. 219,) and the 11th of March, 1837, (Acts of that year, p. 99;) the amounts whereof, after recovery, are to be paid over to the State Treasurer to be disposed of according to the provisions of the different statutes. Thus it may well be said, that in order to give effect to the law of 1835, which is not inconsistent with the law of 1837, (p. 73,) and is not repealed thereby, the provision of the latter act should extend over all sums of money which may be collected and paid into the Treasury of the State, arising from the recovery of all forfeited bonds and recognizances, except those which, by the special provision of the act of 1835, belong to the City of New Orleans, and are recoverable for the use and benefit of the said Corporation. It is clear, as maintained by the appellants' counsel, that if the proceeds of the bond sued on, were not to be recovered by the State, and paid into the State Treasury at

West v. His Creditors.

the time when the law of 1837 was passed, the provisions of said law do not include, and were not adopted in contemplation of, the proceeds of bonds and recognizances which had been previously appropriated for the use of, and properly belong to, the City of New Orleans.

The view we have taken of the first question, precludes the necessity of inquiring into the jurisdiction of the Criminal Court, in this case, for if the State has no right to sue for the recovery of the bond, this action cannot be maintained even before a court of competent jurisdiction; and we conclude that, as the right of action does not belong to the State, but ought to be exercised by the City Attorneys, for the use of the Corporation of New Orleans, the present proceeding ought to be dismissed.

It is therefore ordered, and decreed that the judgment of the Criminal Court be annulled, and reversed, and that this suit be dismissed.

JOHN K. WEST v. HIS CREDITORS.

The State tribunals were not deprived, by the bankrupt law of 19 August, 1841, of any portion of their jurisdiction, necessary to the final administration of the estates of insolvents who had made a surrender of their property previous to its passage. A State court, in which a surrender was made, has authority to decide, between the syndic of the creditors under the cession in the State court, and an assignee subsequently appointed by the United States Court under the bankrupt act, the right to property alleged to have been ceded under the State law, but afterwards placed on the schedule of the debtor, on his application to be declared a bankrupt.

APPEAL from the District Court of the First District, *Buchanan, J.*

GARLAND, J. This case was before us in February last, (4 Robinson, 88,) and remanded for the purpose of permitting E. A. Bradford, assignee of West, the bankrupt, to become a party, and of proceeding to the trial with him according to law. The facts of the case are detailed in the opinion then given. After the rendition of that judgment, the counsel for the syndic of West moved, that Bradford, the assignee, appointed by the Judge of the United States Court, together with John L. Lewis, the Clerk of the Dis-

trict Court of the First District, in whose possession the certificate in controversy is, show cause why the same should not be delivered to said syndic, to be administered for the benefit of those who were creditors at the time of the cession of his property, in 1821. Bradford, in reply to this rule, stated, first ; that the court was without jurisdiction of the subject matter, as the act of Congress had clothed the District Court of the United States, with exclusive jurisdiction of all claims for property, or debts against the assignee of a bankrupt, and the State tribunal has no authority to act in the premises. Other grounds were also stated not necessary to be noticed now, as the exception to the jurisdiction was sustained. From the judgment dismissing this proceeding for want of jurisdiction, the syndic of West has appealed.

The Judge of the District Court has given no reasons for his judgment, nor has the assignee furnished us with any argument, or authority, to sustain it. He says, in his brief, that, under previous decisions, and what is now considered to be the settled practice of this court, the decision below is correct. "The appellee, therefore, thinks it unnecessary to offer any argument on the point." On what decisions of this court the counsel relies, we cannot conceive, being ourselves certain that none given by us, in relation to the bankrupt law, touch the question.

In December last, the assignee of West was clamorous for admission into the State tribunal, for the purpose of having a hearing ; and after succeeding, by a judgment of this tribunal, he turns about and avers that the court have no authority to pass judgment on him. If this be true, why come into the court all ? If the tribunal had no jurisdiction *ratione materiæ*, any judgment it might render would be a nullity, and need not have been noticed by the defendant in the rule.

In this case, the certificate in controversy was not in the possession of the bankrupt, at the time he presented his application to be so declared. It has never been in the possession of the assignee, but is, in fact, in charge of the Clerk of the District Court, where it was brought by a public officer under the order of that court ; and because West thought proper to put it on his schedule, the assignee conceives the title to it is vested absolutely in him, and that another party, who sets up a claim under the order of the

State Court, is to go into the United States Court to have it passed upon. This Court has never decided, nor did we ever suppose, that the State tribunals were deprived of any portion of their jurisdiction necessary to finally administer the estates of insolvents, who had surrendered their property previous to the bankrupt law. We see nothing in the 6th and 8th sections of the bankrupt law, nor in any other part of it, that deprives the State tribunal of its jurisdiction in the present case.

The judgment of the District Court is, therefore, annulled and reversed, and this cause remanded for further proceedings according to law; the appellee paying the costs of the appeal.

L. C. Duncan and *A. Hennen*, for the appellant.

Grymes, contra.

GIDEON C. FORSYTH v. NATHANIEL N. WILKINSON.

Proof of the promise of a purchaser at an auction sale, to pay any loss that may result from a re-sale of the property on his account, and of his authority to the auctioneer to do the best he could with the property, will dispense with the evidence which would otherwise be necessary in an ordinary case of sale, *à la folle enchère*.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Rawle*, for the plaintiff.

Grymes, for the appellant.

MORPHY, J. The defendant having purchased at auction a slave named Fanny, belonging to the petitioner, for the sum of \$835, took her into his possession, but when required to sign the sale, refused to do so, on the ground, that the girl did not suit him, but without pretending, that she had any redhibitory vice or malady. He afterwards took the slave to the auctioneer, J. A. Beard, who had sold her, and, to avoid all trouble, agreed that she should be re-sold on his account, and that he would be responsible for any loss that might arise from the sale. The girl was accordingly sold some time after, and brought only \$600, which was received by the plaintiff, from the new purchaser. This suit is brought to recover the difference between the two sales; and

 Lambeth and another v. Turnbull.

some charges and expenses incident to the keeping of the girl until the time of the re-sale, the costs of advertisements, &c. There was a judgment below in favor of the plaintiff, from which the defendant appealed.

The promise of the defendant to pay any loss that might result from a re-sale of the girl on his own account, and his authority to Beard, the auctioneer, to do the best he could with her, entirely relieved the plaintiff from making the proof which would be necessary in an ordinary case of a re-sale, *à la folle enchère*. Under the powers given to him, Beard put the girl up several times, and bid her in, finding that she did not bring the price he thought she was worth; and the defendant, when informed of what had been done by Beard, answered, that it was all right, and to do the best he could with her. The expenses and account, paid by the plaintiff are satisfactorily proved.

Judgment affirmed.

WILLIAM M. LAMBETH and another v. ROBERT G. TURNBULL.

Where a factor or merchant accepts a bill on the faith of produce consigned to him, it must be considered as an advance on it, and he has, for the amount thereof, the same privilege as though the advance had been made in money; and other creditors, who have no privilege, cannot take the property from him, without paying his advances.

Where property has been shipped to consignees entitled to a privilege thereon, so that the consignor or owner cannot take it out of their hands without paying their claims, a creditor of the owner cannot attach.

A creditor of a consignor, who has attached property of his debtor, in the hands of a consignee, who claims a privilege for acceptances made by him on the faith of the consignment, must show, in order take the property out of the hands of the latter without paying the amount of his acceptances, that the acceptances were not made in good faith, and that the consignee is not bound to pay them.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*
GARLAND, J. The plaintiffs having a judgment against the defendant for a large amount, issued an execution, by virtue of which the Sheriff seized on the 17th of January, 1843, one hun-

dred and forty-five bales of cotton, marked S. as the property of said defendant. Whereupon, Peyton H. Skipwith, presented his petition alleging, that he was the factor of the defendant, who was, at the time the cotton was seized, indebted to him for acceptances, and advances on account of the same, to the amount of \$4735 82. He further states, that previous to the seizure, the defendant had, in the State of Mississippi, for the purpose of paying a balance due, and for the purpose of meeting certain acceptances, which would shortly mature, delivered to the opponent the actual possession of said cotton, which was forwarded by his agent in his (opponent's) name, and was received, together with the bill of lading, previous to the seizure. That the value of the cotton is not equal to the balance due, and the acceptances. He, therefore, prays that the cotton may be restored to him, and the Sheriff enjoined from proceeding to sell the same.

The plaintiffs, for answer to this opposition, deny generally all the allegations, and further aver, that if the acceptances mentioned were given, it was for the purpose of covering the cotton, and protecting it from seizure by Turnbull's creditors. They allege, that no consideration was given for the drafts, nor have they ever been put in circulation. That the opponent has never paid them, nor is he bound for the same.

The evidence shows, that the opponent, in the year 1842, furnished the defendant a considerable quantity of cotton bagging, bale-rope, and other supplies for his plantation. About the last of December, 1842, or the commencement of January, 1843, the opponent accepted for Turnbull four drafts, or bills of exchange, one of which was drawn in favor of Andrew Turnbull, for \$2650, payable at thirty days, and is now held by Bogart, who presented it for payment after maturity, and had it protested. A second was in favor of McKee, for \$500;—a third for \$600, in favor of Dahlgren; and a fourth for \$650, delivered to Jackson. The last mentioned draft being accepted, was delivered to Jackson, about the 16th January, 1843, in payment of his wages as an overseer on Turnbull's plantation; the draft of \$500 was delivered to McKee, about the same time, in payment of his wages as an overseer on another plantation. The draft of \$2650, it is shown, was given to Andrew Turnbull, as a loan, he having given

his note for the amount, payable at a future period, with interest at eight per cent per annum. It is further proved, that Robert J. Turnbull was indebted to the estate of Joseph Niebert, of which Dahlgren is administrator; but whether the draft for \$600 was delivered to him, is not shown. About the time when these bills were accepted, Turnbull gave an order to his overseer to deliver to P. H. Skipwith, or his order, the cotton in question. It was delivered to G. G. Skipwith, as agent of his brother, marked with the letter S. and shipped by him on the 11th January, 1843, to his principal in New Orleans, where it was seized on the 17th of January. The witness testifies, that, at the time of the shipment, the defendant Turnbull had no control, direct or indirect, over the cotton, it having been delivered to him; and that he understood, at the time of delivery, that it was to pay for advances of cash and acceptances given. Andrew Turnbull, is the brother of Robert, the defendant, and both are shown to be large planters in the State of Mississippi.

The Judge of the Commercial Court decreed, that Skipwith should be allowed the sum of \$2164 77, with five per cent interest until paid; but as to the draft of \$2650, he refused to allow it, because he says, there is no evidence of a consideration having passed from Andrew Turnbull to Robert, the defendant, for it; that Andrew and Robert are brothers; and the draft was not presented by Bogart, or any other person for payment, for nearly two months after it was due. From this judgment both parties have appealed; the opponent alleging, that the acceptance of \$2650, should be allowed to him, and the plaintiffs, that none of the drafts should be allowed as the opponent had not paid them. In the case of *Turpin v. Reynolds*, (14 La. 473,) we held, that where a factor or merchant accepts a bill on the faith of produce consigned to him, it is to be considered as an advance on it, and he has, for the amount, the same privilege as though the money had been paid, and that other creditors, who have no privilege, cannot take the property from him, without paying his advances. In the case of *Powell v. Aiken & Gwinn*, 18 La. 328, in which the present plaintiffs were intervenors, we held, that where cotton is shipped to consignees who are entitled to a privilege, so that the consignor or owner could not take it out of their hands with-

Lambeth and another v. Turnbull.

out paying the advances, a creditor of the owner could not attach. The plaintiffs had the benefit of this principle two years ago, and cannot complain of being bound by it now. We will now suppose, that Turnbull was to go to Skipwith, (this seizure being out of the question,) and demand from him the cotton in controversy. The latter would unquestionably have a right to refuse the delivery, until he was released from his acceptances, and repaid his advances on the same; and it would not be competent for Turnbull to say, that the acceptances were without consideration between himself and the drawees of the drafts, even if he could show, that Skipwith was a party to the fraud, or had knowledge of the want of consideration. He could not allege his own turpitude. A creditor of Turnbull can claim no more than his debtor is entitled to, unless he can show the fraudulent intent of the parties. In this case, it is not sufficient to show, that there was no consideration between Andrew and Robert Turnbull; it must be shown, that Skipwith is not bound to pay the draft which he has accepted. His acceptance binds him to pay Bogart, the holder, against whom no charge of fraud is alleged. The argument derived from the fact, that the draft has not been paid, weighs very little in favor of the plaintiffs, as by their act, the opponent was deprived of the means placed in his hands to pay it.

We are of opinion, that the court below did not err in saying, that the opponent was entitled to hold in his hands the amount of the drafts delivered to Jackson, McKee, and Dahlgren. In relation to the supplies there is no contest. But as to the draft for \$2650, we think, it did err. We do not see sufficient evidence of fraud as between Andrew and Robert Turnbull, and none at all on the part of the opponent. The judgment, besides being erroneous in this respect, is also erroneous in another. It decrees, that the opponent recover of the defendant the sum of \$2164 77, with five per cent interest from date, to be paid by preference out of the property seized. Neither party asks for such a judgment, and Turnbull was not before the court. The opponent prays, that the cotton may be restored to him, to be disposed of by him, and we think he is entitled to it, or to the proceeds, if by consent of parties it has been sold.

We have not noticed the bills of exception taken to the admis-

Tutorship of Ezilda Volant Labarre.

sibility of certain portions of the depositions offered by the opponent, as we have found sufficient testimony, without adverting to the objectionable portion.

The judgment of the Commercial Court is, therefore, annulled and reversed, and it is ordered and decreed, that the one hundred and forty-five bales of cotton mentioned in the opposition, and seized by the Sheriff, be restored to the possession of the opponent, Payton H. Skipwith; or, in case of its having been sold, that the proceeds thereof be paid to him, to be applied to the payment of the advances and acceptances made by him for Robert J. Turnbull, as mentioned in the opposition of said Skipwith; and, after paying the same, if any balance remain, it shall be paid to the plaintiffs; they paying the costs in both courts.

C. M. Jones, for the plaintiffs.

Peyton and J. W. Smith, for the intervenors.

In the matter of the TUTORSHIP of EZILDA VOLANT LABARRE.

When a minor has no ascendant in the direct line, the Probate Judge is not to appoint his presumptive heir, as tutor. C. C. 285. When there are relations who may claim the tutorship by the effect of law, or who are bound to accept the same, and the Judge is called upon to appoint a tutor from among them, the tutorship is a legal one, and he cannot appoint the presumptive heir, but must select the nearest of kin who comes after such presumptive heir or heirs.

It is only where a minor has no relations who may claim the tutorship by the effect of the law, or who are bound to accept the same, that there is room for a dative tutorship. C. C. 288.

APPEAL from the Court of Probates of Jefferson, *Smith, J.*

M. V. Labarre, for the appellant.

L. Peirce, contra.

MORPHY, J. This is an appeal by Joseph Volant Labarre, from a judgment of the Probate Court of the Parish of Jefferson, refusing to homologate the deliberations of a family meeting, which recommended Joseph Volant Labarre to be tutor of the minor Ezilda Volant Labarre, and to deliver to him letters of tutorship. The ground taken by the Judge is, that the person thus recom-

Tutorship of Ezilda Volant Labarre.

mended is the brother and presumptive heir of the minor, and that under article 285 of the Civil Code, he cannot appoint him. The article relied on by the Judge is as follows: "In case the minor has no ascendant in the direct line, the legal tutorship shall be given to the nearest of kin in the collateral line, *who comes immediately after the presumptive heir or heirs of the minor*; and if there are two or more relations in the same degree, *after the presumptive heir or heirs of the minor*, the Judge shall appoint one of them, by and with the advice of the meeting of the family."

This provision of law, which existed in the Code of 1808, p. 62, art. 10, is not to be found in the Roman, Spanish, or French laws, from which we have borrowed most of ours on this subject. It was clearly taken from the laws of Solon, which forbade, among other similar regulations, that the presumptive heir of a minor, should be his tutor. Introduction au Voy. dans la Grece, par Barthelemy, 267. Thelusson, Histoire de la Jurisp. Rom. p. 18, Lorry, Institutions, vol. 1, p. 160.

This is the first time, we believe, that this article of the code has been brought to our notice for construction, if from the language used in it there can be room for any. It is, however, contended by the appellant's counsel that the exclusion therein pronounced, must be confined to those cases only where the tutorship is claimed by the effect of the law, and does not apply to a dative tutorship; that, in the former kind of tutorship, the Judge appoints alone, without the advice of a family meeting, except where there are two or more relations in the same degree; while, in the latter, the tutor is always appointed by and with the advice of a family meeting; that the members of the family meeting, who are personally acquainted with the person they select as dative tutor, would not recommend the brother of the minor, if he were of such a character as to sacrifice the interest of the minor to his own; that this exclusion is not to be found in article 288, which treats of dative tutors, nor in article 322, which enumerates all the causes of incapacity, or exclusion, in relation to tutorship in general.

The legal rights and incapacities of parties cannot be varied by the proceedings they may think proper to institute to obtain such rights, or to avoid such incapacities. The intention of article 285 is clearly, that when a minor has no ascendant in the direct line,

the Judge is not to appoint his presumptive heir to be his tutor. This prohibition of the law is not to be evaded by calling for a family meeting, when, perhaps, none was necessary in this case, and treating as a dative tutorship, one which is clearly a legal tutorship. It is only where the minor has no relations who may claim the tutorship by the effect of the law, or who are bound to accept the same, that there is room for a dative tutorship. Civil Code, art. 288. When there are such relations, and the Judge is called upon to appoint a tutor from among them, the tutorship is a legal one; and, under the law, he cannot give the trust to the presumptive heir, but must appoint the nearest of kin, who comes after such presumptive heir or heirs. If such be clearly the duty of the Judge, it is not seen how the deliberation of a family meeting can authorize him to violate it. Whatever we may think of the policy of this provision of our code, or of the inconveniences it might create, it is free from doubt, and must be carried into effect.

Judgment affirmed.

SUCCESSION OF FREDERICK JACOBS—ANDREW THOMAS, Tutor,
Appellant.

Where an appeal has been applied for within the time prescribed by the Code of Practice, art. 593, it may be obtained even after that period, when the delay results from the necessity of applying to the Supreme Court, created by the refusal of the inferior Judge to allow the appeal.

Unliquidated claims against a succession, need not be presented to the administrator for his approbation, before commencing an action therefor. C. P. 984, 986.

The owner of an unliquidated claim against a succession, cannot obtain judgment therefor, by a rule to show cause taken against the administrator. The action must be brought in the ordinary manner, before the Court of Probates in which the succession was opened.

APPEAL from the Court of Probates of Jefferson, *Dugué, J.* The administrator of the succession of Frederick Jacobs deceased, is appellant from a judgment rendered on a rule taken by one John A. Zender on him, to show cause why he should not pay

out of the funds of the succession, a claim for a commission of five per cent on the value of certain property alleged to have been recovered by Zender, as agent for the deceased. There was a judgment allowing a part of the claim.

McKinney, for the appellant.

J. Seghers, contra, contended that the appeal must be dismissed, having been taken after the expiration of a year from the date of the judgment, the appellant being a resident of this State. Code of Practice, art. 593. *Vigilantibus, non dormientibus lex subvenit.*

MARTIN, J. The dismissal of this appeal is asked on the ground, that it was taken after the expiration of one year, from the rendition of the judgment. Art. 593 of the Code of Practice. The judgment was rendered on the 8th of April, 1842, and signed on the 14th; a petition of appeal was filed on the 26th. The Judge refused to allow the appeal; and application to us became necessary, and a *mandamus* was obtained, obedience to which was delayed on account of the indisposition of the Judge.

As the application for an appeal was made before the expiration of the period fixed by law, and the delay resulted from the recourse to us, which the refusal of the Judge rendered needful, the appellant cannot suffer on that account. The appeal must, therefore, be sustained.

The appellant filed an exception, on the ground, that the claim had not been presented for his approbation, and that the claimant ought to have proceeded by a petition, and not by a rule to show cause, as he has done, relying on the Code of Practice, art. 984, *et seq.*

The exception ought to have been sustained, not on the first ground, for we have held that unliquidated claims need not be presented to the administrator for his approbation. *Anderson's administrator v. Bidsall's administratrix*, 19 La. 444. But on the second; for the Code of Practice, art. 986, requires if the claim be unliquidated, as the present is, or if liquidated and disapproved, that the party should bring his action in the ordinary manner.

The Court of Probates erred in giving judgment against the appellant on the rule.

It is, therefore, ordered and decreed, that the judgment be annulled and reversed; and it is ordered that the rule be discharged, with costs in both courts.

THOMAS POWELL v. JOHN KELLAR.

Where a Sheriff, by whom property has been sold under a first mortgage, pays over the surplus of the proceeds, remaining after its satisfaction, in discharge of subsequent general mortgages, binding on the defendant, he will not be liable to the latter, the act causing him no damage.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Hoffman*, for the appellant.

Benjamin, contra.

MORPHY, J. Two lots of ground belonging to the defendant, were seized and sold in execution, on the 16th of August, 1841, to satisfy a judgment declaring a privilege thereon for \$13,910 99. The Canal and Banking Company, to whom this judgment had been assigned by Powell, purchased the property for \$17,200, at the Sheriff's sale. After the adjudication, J. S. Conklin, the attorney on record of the defendant, called upon the Deputy Sheriff to know, what disposition was to be made of the balance of the price obtained for the property, after satisfying the writ placed in his hands. The officer showed him the certificate of the mortgages on the lots, and told him that he intended to pay the two mortgages next recorded, and he applied such balance accordingly. The two next judicial mortgages thus paid were held, one by the Canal and Banking Company, for \$635 36, and the other by Andrew Hodge, for \$1615 41. The purchaser sued out a monition, to which the defendant filed an opposition, in September, 1841, which he afterwards withdrew. On the 21st of January, 1843, the defendant, appearing by other counsel, took a rule on the Sheriff to show cause why the latter should not pay over to him the sum of \$2250, the balance of the price remaining after satisfying the judgment under which the property had been sold. This rule having been discharged by the inferior Judge, the defendant appealed.

It is not pretended, that the judgments paid by the Sheriff had been previously satisfied, or were not binding on the defendant and his property ; but it is urged, that under the law, that officer was bound to pay over this money to the defendant in execution ; that as the judgment creditors had made no seizure in his hands, the mere recording of their judgments did not authorize the Sheriff to apply the funds as he did ; that in sales under execution, the purchaser is authorized to retain only the amount of the special mortgages on the property, anterior or preferable to that of the seizing creditor, or to apply the surplus of the price only to the special mortgages existing on the property, subsequent to that of the suing creditor ; but that as relates to general mortgages, whether legal or judicial, the purchaser cannot refuse to pay the price, or retain any part thereof, to pay the mortgages, unless there has been a suit commenced against him, under such general mortgages, or he has just reason to fear that such a step will be taken ; and we are referred to articles 704, 678, 679, 683, 685, 706, 707, and 710 of the Code of Practice. These several articles seem to rest upon the ground, that as a general mortgage affects all the property of the debtor, and the person who holds such a lien, can enforce it, whenever he pleases, on any part of the same, the suing creditor should not be delayed in the collection of his debt, by the existence of such a mortgage upon the particular piece of property he has levied upon ; hence, it is provided, that property sold under execution, must be sold subject to the general mortgages upon it, and that the purchaser must pay the price to the suing creditor, except in the cases provided for in article 710 : but it is by no means so very clear, as the appellant's counsel would have it, that when property is sold under a first mortgage, as in the present case, and is affected by subsequent general mortgages, the surplus of the proceeds remaining after paying the first mortgage, is to be paid to the defendant in the execution. Article 708 of the Code of Practice provides, that " the purchaser is bound for nothing beyond the price of his adjudication, and if, after paying the suing creditor, as directed in the preceding article, there remains nothing more due, to discharge mortgages subsequent to that of the suing creditor, the Sheriff shall give him a release from these mortgages." From this provision, it may well

be inferred, that if there remains a surplus to discharge subsequent mortgages, the Sheriff shall grant no release, at least to the extent of such surplus. The question then, is, what is to be done with this excess? We understand that in this parish, the Sheriffs have uniformly understood this article as authorizing them to discharge the subsequent mortgages, to the extent of the funds in their hands, in order to give to the purchasers a clear and unincumbered title. Although the latter cannot withhold from a suing creditor the payment of the price, by reason of general mortgages on the property, (except in certain cases,) it does not necessarily follow, that in a case like the present, he should be bound to pay the surplus of the price to the defendant in execution, against whom the law gives him a recourse, in case he is evicted the day after he has paid. Code of Practice, art. 713. Should he not be permitted, to avoid the necessity and danger of such a recourse, not to retain, but to pay this money to the judgment creditor or creditors, whose mortgages stand recorded, immediately after that of the suing creditor? In the present case, the Canal and Banking Company, who have done so, through the Sheriff, might be considered as subrogated to the rights of such creditors, under article 2157 of the Civil Code, which declares, that "subrogation takes place, of right, for the benefit of a purchaser of any immoveable property, who employs the price of his purchase in paying the creditors, to whom the hereditament was mortgaged." But admitting, that in strictness of law, the Sheriff was without authority to make these payments, he can be answerable to the appellant, only for the injury he has done him by his error, or illegal act. If the judgments, which have been satisfied out of this money, were binding, and could have been enforced against him, (which is admitted,) the act of the Sheriff, although irregular, has caused him no real injury. It is, as to him, *damnum absque injuria*. Equity forbids, that he should recover of the Sheriff, who has released the mortgages, money which has been applied to the payment of his just debts, and thus enrich himself at the expense of that officer. Thus, he who has paid, through mistake, the debt of another, believing himself indebted, has a claim against the true debtor, if, in consequence of the payment, the creditor has destroyed, or parted with his title. Civil Code, art.

Harrison v. Wilson.

2288. In relation to one of the two mortgages, that of \$635 36, its amount never was in fact received by the Sheriff, because the Canal Bank, which held it, having purchased the property, the surplus of price they had to pay was reduced by compensation, to the extent of the second mortgage claim they had against the defendant in execution. In conclusion, we must remark, that the evidence renders it extremely probable, that the appellant knew that the Sheriff intended to apply this balance as he did. J. S. Conklin, his counsel on record, was informed of such intention, which, it is fair to presume, he communicated to his client. No objection was then made to this disposition of the money, and seventeen months after, it has been accordingly paid, and has availed the defendant. An attempt is made to recover it from the Sheriff, which cannot succeed, as the act of that officer, admitting it to be unauthorized by law, has caused no injury to the plaintiff in the rule.

Judgment affirmed.

JOHN C. HARRISON v. L. G. WILSON.

An assignment of a claim, though gratuitous, followed by notice to the debtor, who had no offset at the time, is valid as to him.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*

BULLARD, J. This is an action to recover of the defendant, the amount of an account, originally due to Ogden & Southgate, alleged to have been assigned by them to Sully, and by the latter to the plaintiff, and due notice of the assignment and transfer to have been given to the debtor.

The defendant admits, that he owed originally to Ogden & Southgate, most of the debt; but avers, that it has been extinguished by compensation. He avers, that on or about the 1st of August, 1841, he endorsed and transferred to A. T. Pickrell, a bill of exchange, which had been previously accepted by Ogden

& Southgate, and transferred to him (the defendant,) for \$786 70, which was protested at maturity, to wit, December 23d, 1841, and which he was compelled to take up as endorser, and of which he is yet the holder.

There is no doubt of notice having been given to the defendant of the assignment by Ogden & Southgate to Sully. This is shown, not only by the testimony of Sully, but by the fact, that a draft was drawn on Wilson for the amount, together with additional charges for difference of exchange, accompanied by a letter of advice, in which he was informed that it was drawn on that account. This draft was presented, and protested for non-acceptance, on the fourth of September, 1841, and the acceptance of Ogden & Southgate, which is pleaded in compensation, was not acquired until November following. It is true, that notice of the assignment by Sully to Harrison is not shown; but that is of no consequence, because the defendant does not pretend to have any offset as against Sully, the plaintiff's immediate assignor.

But the defendant pleads, not only that he never had any notice of either of the transfers, and that the debt has been constantly treated as due to Ogden & Southgate, but that if there was a transfer to Sully, the same was without consideration.

The court below considered, that the case presented two questions, to wit: *first*, whether the defendant, Wilson, had any notice of the transfer to Sully; and, *secondly*, whether he can inquire into the want of consideration of that transfer.

I. We have already said, there was notice proved in our opinion: but there is another circumstance which strengthens our conviction on that point. The defendant pretends, that he had endorsed an acceptance of Ogden & Southgate, which he was compelled afterwards to take up. It is shown by the evidence of the broker, that he purchased that acceptance, at a considerable discount, in November, and afterwards put his own name upon it, and had it left for collection in the hands of the same broker, and it was protested. At the time of the protest it was already the property of the defendant. Previously to the purchase of the paper, which was in November, he had offered to pay a part of the original debt to the transferree, and Sully swears positively that he notified him, that the debt belonged to him.

Keith v. Mackey.

II. At the time the transfer is shown to have been made by Ogden & Southgate, Wilson had no interest in contesting the validity of the transfer. It is not pretended he had any offset, at that time; and if the assignment had been gratuitous, and followed by notice, which is equivalent to a delivery as to the debtor, it would have been valid as to him.

We conclude, that the defence is untenable, and that the court erred in sustaining it. The defendant, in his answer, admits \$593 50, of the debt.

It is, therefore, ordered and decreed, that the judgment of the Commercial Court, be avoided and reversed, and that the plaintiff recover of the defendant the sum of *five hundred and ninety-three dollars and fifty cents*, with interest at five per cent from the 27th of January, 1842, until paid, and the costs of both courts.

Rawle, for the appellant.

Peyton and J. W. Smith, for the defendant.

CALVIN J. KEITH V. WILLIAM MACKEY.

Where, after the last day of grace, the drawer of a bill promises the holder to pay it, if he will not present it, and the latter subsequently presents and protests it, the former will be released from any obligation arising from his conditional promise.

After the last day of grace, the funds in the hands of the drawee are at the risk of the holder.

Though the drawer of a bill may be discharged from his obligation to pay it, by the neglect of the holder to have it presented at the place of payment, and protested, and to have notice given thereof, on the ground of the damage he is presumed to have sustained by the *laches* of the latter, yet, if he afterwards withdraws from the hands of the drawee the funds on which he had drawn, he will be responsible, under art. 2294 of the Civil Code, to the holder, who had become the owner thereof, for the amount.

APPEAL from the District Court of the First District, *Buchanan, J.*

Preston, for the plaintiff, cited Chitty on Bills, 1, 2, 424, 533-535. Bailey on Bills, 294, note 137 Ib. 304 and 496,

note 26. 3 Mart. N. S. 5. 9 La. 128. 13 La. 101. 12 Mart. 671.

L. C. Duncan, for the appellant.

MARTIN, J. The defendant is appellant from a judgment against him, as drawer of a bill of exchange, not presented, nor protested in due time. The record shows, that the parties met in New York, some time between the last day of grace and the day on which the bill was finally protested, when the defendant promised to the plaintiff, that if he would forbear to present the bill, he would pay it shortly; notwithstanding which, the bill was afterwards presented, protested, and the present suit brought. It is very clear, that the plaintiff, by protesting the bill, absolved the defendant from all obligation under the conditional promise he made. But the plaintiff's counsel contends, that the obligation of the defendant results from his withdrawing from the hands of the drawees, the funds on which he had drawn. On the expiration of the last day of grace, the funds in the hands of the drawee were at the risk of the plaintiff. The acceptor of a bill, payable elsewhere than at his domicil, is discharged by the delay of the holder in presenting the bill at the place indicated for payment, if he prove that the delay has been injurious to him, by the failure of the banker who was named in the acceptance; as, in such case, the delay put the funds at the risk of the holder. Chitty on Bills, 424, 533, 534, 535. "If the drawer withdraw his funds from the hands of the drawee, for the purpose of preventing payment by the drawee, neither presentment nor notice is necessary, in order to charge him." Bailey on Bills, 294. note 137. Ib. 304, and note. See Ib. 496, and note 26. In the edition from which this quotation is taken, the editor adds, in a note, that the consequence is the same, if the funds be withdrawn after the expiration of the days of grace. Pardessus, in his *Traité du Contrat de Change*, vol. 1, p. 407, says, that the consequences of the bankruptcy or insolvency of the drawee, are at the risk of the negligent holder. In Chitty on Bills, 481, it is said: "where a bill has been refused acceptance or payment, and the drawer has either stopped or withdrawn the effects from the hands of the drawee, though he may be, *prima facie*, discharged by the neglect to give him due notice, it seems, that in France

and America, the holder might recover from him the amount of such funds, but there is no decision to this effect in this country," (England.) The author speaks of two cases; one in which the funds have been stopped; the other, that in which they have been withdrawn. The funds have been stopped, when by the act of the drawer, they have been prevented from being paid to the holder, at the maturity of the bill; they are withdrawn, when afterwards, as in the case before the court, they are taken by the drawer. If Chitty spoke only of the case of funds taken away before maturity, he would not have said, "*it seems.*" He would have spoken positively; for the authorities, on this point, are numerous in France and America, and there are none to the contrary. Neither could he have said, that there was no decision to this effect in England. The reason that the drawer is discharged from his obligation to pay the bill, by the neglect of the holder to have it presented and protested, and to give notice, is, that he is always presumed to have sustained damage by the holder's *laches*. Chitty on Bills, 6th ed. 245. Proof that he has retaken his funds, is proof that he has sustained no loss. The presumption ceases on the administration of contrary proof. *Stabit presumptio donec contrarium probetur.*

If the funds, after maturity, are in the hands of the drawee, at the risk of the negligent holder, and he must bear the consequences of the bankruptcy or insolvency of the former, he must be the owner of such funds, for *res perit domino*. If this be the case, whoever takes them, without his authority, from the drawee, does him an injury, and we have a textual provision, that "every act whatever of man that causes damage to another, obliges him by whose fault it happened, to repair it." Civil Code, art. 2294. On the maturity of the bill the drawer may be discharged, by the neglect of the holder, of any obligation then existing, to pay it; but it cannot be thence concluded, that by his posterior torts he may not incur the obligation so to do. This obligation certainly results from his repossessing himself of the funds. It is just to say, that then the discharge, which resulted from the negligence of the holder, has ceased. It was grounded on the damage which he sustained, or was presumed to sustain, by the negligence of the holder. If the damage does not exist, there ought to be no

discharge; *cessante causa, cessat effectus*. When the funds, destined to the payment of the bill, come, no matter how, into the hands of the drawer, he has sustained no loss, and no damages can be due him. Otherwise he would enrich himself at the expense of the holder. *Neminem oportet alterius damno locupletari*. It has been held by the Court of Cassation in France, that the drawer of a bill of exchange cannot oppose to the holder, his negligence to present and protest the bill, or to give notice in due time, when, since the protest, the drawee having failed, he has successfully claimed from the syndic part of the goods which he had sent to provide for the payment of the bill. Sirey, 3, 1, 268. In citing this decision, candor requires it to be stated, that there has long been in France a textual provision, in the ordinance of 1673, which has been copied into the Code of Commerce, (art. 171,) on which, probably, it is grounded. There is no textual provision, as far as we know, in England or America, that the drawer is discharged from the obligations on the bill, by the neglect of the holder. The decisions of courts which recognize this principle, cannot be extended to cases not similar to those in which they have been made. The neglect of the holder may discharge the drawer from his then existing obligations; but it confers on him no right, nor any immunity from the consequences of his posterior act.

* MORPHY, J. I concur in the foregoing opinion.

SIMON, J. I concur in opinion with Judge MARTIN, and adopt his conclusions.

GARLAND, J. dissenting. The petitioner alleges, that the defendant is indebted to him \$370, with five per cent damages and interest, because the said defendant, in April, 1842, drew a bill of exchange on Barnard, Adams & Co., residing in Boston, payable one hundred days after date, to the order of said petitioner, which, when it became due, was not presented for acceptance, in consequence of an agreement made by said defendant, prior to its maturity, that said bill would afterwards be paid by him, or that he would authorize the drawees to pay it, they having, at the time the bill became due, and long afterwards, a sufficiency of funds belonging to the defendant to pay the same, which he had deposited there for said purpose, and which he, (petitioner,) considers

as belonging to him. The petitioner further represents, that some time after the maturity of the bill, it was presented for acceptance and payment, but the drawees refused to do either, because the defendant had, between the time of the maturity of said bill, and its presentation, received the balance of his account, whereupon it was protested for non-payment, and notice given accordingly. The plaintiff attached property of the defendant's, who is a non-resident, and prayed for a judgment.

The real facts of the case are : that on the 6th of April, 1842, the defendant drew a bill in favor of the plaintiff, at one hundred days after date, for \$370, to be charged to account of pork and lard. The bill was not presented for acceptance, or payment, previous to maturity, nor on the day of its becoming due. About fifteen days after the day of payment, the plaintiff met the defendant in New York, when the former told the latter, that the bill had not been forwarded for acceptance ; whereupon the defendant said, that he had recently returned from Boston, and had drawn out of the hands of the drawees all the funds they had realized up to that time, on the produce they had in charge for him ; but if he, (plaintiff,) would hold up the bill, without presenting or protesting it, as it could not then be legally done, he, (defendant,) would pay it as soon as he could spare the funds ; but no unconditional promise was ever made to pay. It is not denied, that at and previous to the maturity of the bill, the defendant had funds in the hands of the drawees.

There was a judgment for the plaintiff, and the defendant has appealed.

Chitty, in his Treatise on Bills, 6th ed. p. 245, says : " it is settled, that the holder of a bill must present it to the drawee for payment at the time when due, when a time of payment is specified ; and when no time is expressed, within a reasonable period after receipt of the bill ; and if he neglect to do so, he shall not afterwards resort to the drawer or endorsers, whose implied contracts were only to pay in default of the drawee, and not immediate and absolute, and who are always presumed to have sustained damage by the holder's *laches*," which the law abhors. The doctrine is well established, that the holder of a bill must present it for acceptance before, or on the day of its maturity, or for pay-

ment on that day ; and if not accepted or paid, that notice must be given to the drawer to hold him responsible. There are some circumstances which will excuse the presentation and notice of non-acceptance or non-payment, which the holder must establish, to make the drawer or endorser responsible. This court, in 12 La. 386, says " where a bill of exchange is not presented for acceptance, nor for payment, until two days after the expiration of the last day of grace, the drawer is released, unless the holder shows that the drawee had no funds of the drawer in his hands. The drawer of a bill is presumed to have funds in the hands of the drawee, and has a right to require that the payee should present it for payment on the last day of grace, and, on failure of payment, to have it protested, and legal notice given." At page 402, of the same volume, the same principle is reiterated, and the court say, that the irregularities of the mail, which prevented the bill from arriving in season, will not excuse its non-presentation for payment, on the day it is due. In that case, the bill was received and presented two days after maturity, yet the drawer was held not liable. There are other cases which settle the jurisprudence of this, and all commercial countries, in relation to this question ; (9 Johns. Rep. 121. 12 Ibid. 423. 4 Mass. Rep. 341) ; but it is unnecessary to cite them all. It is very certain, that if the drawer of a bill has no funds in the hands of the drawee, nor any reasonable expectation of having them at the time of maturity, he is liable, without presentation and notice ; but if he have funds, or if funds, or a consignment of goods, are on the way, and a reasonable expectation of their arrival in time, or if he has been in the habit of drawing bills on the drawee, although he have no funds, the drawer is discharged, unless a presentation at or before maturity, and a notice of dishonor is established. 3 Campbell, 217. 16 East, 43.

If the drawer of a bill withdraw his funds, previous to maturity, from the hands of the drawee, for the purpose of preventing payment by the drawee, neither presentment or notice is necessary to charge him. 3 Mason, 113. 2 Nott & M'Cord, 254. Bailey, on Bills, 304. So, if he forbids the drawee's paying it ; or if he intercepts funds which the acceptor expects to receive to pay it. But it cannot be now doubted, that if the drawer has funds in the

Keith v. Mackey.

drawee's hands at the time of maturity, that he is discharged, if the bill is not presented at that time, and, if not paid, protested, and notice given.

In this case the defendant had ample funds in the hands of the drawees, at the maturity of the bill, and, it not having been presented for payment, he was discharged from all responsibility, and being so discharged, he had a right afterwards to settle his account, and withdraw all his funds from the hands of his correspondents. He was not bound to leave funds in the hands of the drawees, to pay a bill for which they were not responsible, not having accepted it, and from all liability for which he had been discharged by the negligence of the holder. If the defendant was bound to leave his funds in the hands of the drawee in such a case, it seems to me, there is very little necessity for presentment and notice. The legal discharge from all responsibility is of little value, if the money is to be left to pay the bill, whenever it may suit the holder to call for it. It is, in fact, saying, that a man must leave his money to pay that, which the law says he is not bound to pay.

The case put by the counsel for the plaintiff, of an acceptor not being discharged by the bill not having been presented on the day of maturity, is not, in my opinion, applicable to the one before us. The acceptor is absolutely bound; he has funds ready; no notice, or protest is required to bind him; and yet we see that if he sustained any damage by the delay, for instance, by a bank failing, or by a depreciation in the funds provided to pay with, it is the holder's loss.

The counsel for the plaintiff, in his written argument, says, "that he does not rely on the defendant's subsequent promise to pay, as supposed, but on his liability, because he received the funds of the plaintiff here, for his own funds in Boston, and afterwards took those funds, which he had sold, and now keeps them. That which he had assigned for value received, he afterwards appropriates to his own use, and says he will pay nothing." This argument assumes, that, as the bill directs the amount to be charged to the account of pork and lard, it is an assignment of a portion of the proceeds of those articles in the hands of the drawees. It is, I believe, admitted by all, that a bill of exchange

Darse v. Leaugment and another, Executors, &c.

is not an assignment of a portion of a fund in the hands of the drawee; and this court, in 13 La. 101, says, "it is well settled, that where an order is drawn on a particular fund, for a part only, it does not amount to an assignment of that part, unless the drawee consents to the appropriation, by an acceptance of the draft." 5 Wheaton, 285, 6. If it were true, that the drawing of a bill of exchange constitutes an assignment of so much of the fund drawn on, as is expressed in the bill, all the provisions of the law in relation to presentation and notice would be idle ceremonies.

My opinion is, that the plaintiff, by failing to present the bill for acceptance or payment previous to, or at its maturity, and by not having shown any sufficient cause to excuse his negligence, has lost all right to recover on it; and as his counsel admits, that he does not rely on the conditional promise to pay, I see no alternative but to give a judgment for the defendant.

Judgment affirmed.

ANTOINETTE DARSE v. HENRY LEAUMONT and another, EXECUTORS OF CECILIA BONILLA, and another.

Under arts. 608 and 616, of the Code of Practice, a Court of Probates has jurisdiction to annul, or rescind decrees or judgments rendered by itself, though the controversy involve the ownership of immoveable property.

APPEAL from the Court of Probates of New Orleans, *Bermudez, J.*

Johnson and *L. Janin*, for the appellant.

Schmidt, for the defendants.

MORPHY, J. This suit is brought against the executors of the late Cecilia Bonilla, by one of her children, to annul a purchase of certain immoveable property made by the deceased as their tutrix, by and with the advice and consent of a family meeting, and under a decree of the Probate Court, and to have such property declared

Darse v. Leasumont and another, Executors, &c.

to belong to the estate of the late Cecilia Bonilla. The petition represents, in substance, that Samuel Hart, who died in 1832, bequeathed one-fifth part of his entire estate to the four children of Cecilia Bonilla, of whom the petitioner is one; that at the sale of the property of his succession, John McDonough purchased for Cecilia Bonilla, four lots of ground in the suburb of St. Mary, for a sum of 32,000; that although the adjudication had been thus made to Cecilia Bonilla, in her own name, she presented to the Court of Probates a petition in which she incorrectly averred, that she had become the purchaser of said lots for account of her children, and had accepted a sale of them as their tutrix, before Felix Grima, notary public, on the 27th of April, 1835; that although the sale was one on credit, she had paid the price in anticipation, by discounting her notes, and had made such payment out of funds in her hands belonging to said minors; that whereas, she had made this purchase for the minors, without having been previously authorized thereto, she prayed that a family meeting be called to deliberate and give their opinion on the propriety of approving and ratifying her act; that the family meeting declared the purchase highly advantageous to the minors, and ratified the same, and that their deliberations were duly homologated by a decree of the Court of Probates; that, in 1841, Cecilia Bonilla filed an account of her tutorship, in which she represented, that the nett amount she had received for the minors from the estate of Hart, was \$15,169 59; that consequently the minors were indebted to her on account of the purchase made, and paid for by her, in the sum of \$17,639 41, and that, after crediting the minors with the rents of the property up to the 20th of April, 1841, and debiting them with the interest, expenses of education, commissions, &c., up to the same date, they owed her a balance of \$25,020 89; that Cecilia Bonilla died shortly after, leaving a nuncupative will, in which she made divers legacies, amounting to \$4000; and that the property she left is insufficient to pay her debts, independently of the aforesaid claim against her children. The petitioner avers, that the adjudication of the four lots of ground having been made to the said Cecilia Bonilla in her own name, she could not thereafter transfer them to

Darse v. Leaumont and another, Executors. &c.

her minor children; that the family meeting acted without being advised of the means of said minors, and would never have recommended the transfer of said property to them, had they known or believed, that thereby the minors would be largely brought into debt, and had they not been misled by the allegations of the petition of Cecilia Bonilla, from which it appeared, that the means of said minors were sufficient to pay for the same; that the purchase of property by or for minors, in the manner attempted, is unauthorized by law; and that the deliberations of the family meeting, and the judgment of the court homologating the same, are illegal, and ought to be set aside. The other minor children of the deceased, who were made parties to this suit, joined in the prayer of this petition. The executors pleaded the general issue. There was a judgment of nonsuit below, from which this appeal has been taken.

Although no plea was made to the jurisdiction of the Probate Court below, the Judge in his judgment, and the appellees' counsel here, have questioned the competency of that court, on the ground, that the contest has reference to the ownership of immoveable property, and that it is a real action. The Court of Probates has, we think, jurisdiction in the premises. The object of the suit is, to annul and rescind the proceedings and decree, under which the purchase made by the late Cecilia Bonilla, was approved, ratified, and made binding on the children. Under arts. 608 and 616, of the Code of Practice, the Court of Probates has jurisdiction to decide on the nullity or rescission of decrees, or judgments rendered by itself. So we held in *Harty v. Harty*, (8 Mart. N. S. 518,) in which a suit was brought, in that court, to set aside an adjudication it had made of certain property to the defendant, who was the mother of the plaintiffs.

On the merits, we concur in opinion with the Judge who tried the case, that the main fact on which this action is based, is not conclusively shown; to wit, that the purchase made for the account of the children of Cecilia Bonilla, exceeded their means, and brought them largely in debt to the estate of their mother. If this had been clearly shown to be the case, they would probably have been entitled to relief, as the family meeting, and the decree of the court, ratified a purchase represented to have been made

for the minors, and paid for out of their money. These proceedings did not sanction any loan, or advance of money to the minors, to make a purchase beyond their means. An investment of funds belonging to the minors was intended to be ratified, and not a speculation which might involve them in debt and difficulty. But the only evidence which we can see, tending to show the inadequacy of the minors' means to purchase the property in question, is an informal account, purporting to be rendered by Cecilia Bonilla, not signed by her, and which does not appear to have ever been acted upon in any way. The statements made in this account, which the plaintiff herself alleges to be essentially incorrect, cannot outweigh the declarations of the tutrix in her petition to the Probate Court, that she had paid for the property with funds belonging to the minors, especially when, on examining the account rendered by the executors of Hart, we find, that the estate they surrendered into the hands of the legatees, amounted to \$177,196 22. The fifth part of this amount, which was accruing to these minors, and which we must presume was received by their tutrix, is \$35,435 24, a sum more than sufficient to pay for the property. Under this evidence the executors could not recover the claim set up against the children of the deceased by reason of the purchase. Should they make the attempt, the plaintiff, and her co-heirs, could easily show, we apprehend, either that the property was really paid for with their own means, or that the purchase was one unauthorized, illegal, and injurious to their interest, being made for a sum so greatly exceeding their ability to pay. But as the case stands before us, we cannot say, that the property has not been paid for with the money of the minors, and must, therefore, affirm the judgment of nonsuit rendered below. We come the more readily to this conclusion, as it is clear, that the executors are mere nominal defendants in this suit. If they have any interest in the controversy at all, it is, that the plaintiff should succeed in having these lots declared the property of the estate of Cecilia Bonilla; for, in that event, they would be entitled to a commission on the proceeds of it. The true parties, whose interest would be affected by such a judgment, would be the legatees of the deceased, who expect to be paid out of the sum which appears to be due to the estate by the

Prats v. His Creditors.

children. If the latter had succeeded in this suit, instead of figuring as debtors to the estate of their mother, they would have become mortgage creditors, to an amount more than sufficient to absorb the value of the property.

Judgment affirmed.

JOSÉ PRATS V. HIS CREDITORS.

A mortgage obtained by a creditor who knew of the insolvency of the debtor at the time, is null as to other creditors, so far as it gives the mortgagee any advantage over them, though executed more than three months before the failure. C. C. 1979. Where the only objection to such a contract is the undue preference, the action to rescind is prescribed by one year.

A fraud perpetrated by the machinery of a judgment, where the court was made the unconscious instrument, is as liable to be annulled as when effected in the usual form of a contract.

APPEAL from the Parish Court of New Orleans, *Maurian, J. Bodin*, for the appellant.

L. Janin, for the syndics.

BULLARD, J. On the presentation of a second tableau of distribution by the syndics of the insolvent, his son-in-law, *Vionnet*, made opposition, on the ground that he was a mortgage creditor of the insolvent, by an act granting a special mortgage, dated 13th of April, 1839, to secure to him the payment of two notes of six thousand dollars each, which had not been placed on the tableau.

The syndics answer this opposition by alleging, that the mortgage relied on and set up by the opponent, is null and void, having been made without any consideration, and for the purpose of defrauding the creditors of *Prats*, and by connivance with and for the advantage of said *Prats*, who is the father-in-law of the opponent. They further say, that if there was any consideration for said mortgage, the opponent knew, at the time the same was executed, that *Prats* was insolvent.

The Parish Court dismissed the opposition, and the opposing creditor appealed.

Prats v. His Creditors.

It was clearly shown, that at the date of the act of mortgage, which was about three months and a half before the surrender, Vionnet knew of the insolvency of Prats; and it is not now even pretended, that the twelve thousand dollars, stated in the mortgage to have been loaned and advanced were so in reality. It is, on the contrary, attempted to be shown, that another sum was due on account of a schooner called the *Tragomillas*, sold in Cuba as the property of Vionnet. Admitting for the sake of this argument, that Vionnet was a creditor of Prats, which he cannot well deny, the question occurs, whether, having obtained a mortgage with a knowledge of the insolvency of his debtor, it is not null as to creditors, so far as it gives the opposing creditor, or mortgagee, any advantage over the other creditors of the insolvent.

Since the decision in the case of *Brandice v. His Creditors*, 4 La. 247, and that of *Rhodes & Peters v. Beaman & Waters*, in the 10th vol., p. 363, we can hardly regard this as an open question. Indeed, it is difficult to imagine what other construction could be given to article 1799 of the Civil Code, which declares, in so many words, that "every contract shall be deemed to have been made in fraud of creditors, when the obligee knew that the obligor was in insolvent circumstances, and when such contract gives to the obligee, if he be a creditor, any advantage over other creditors of the obligor." It is true, as remarked by the counsel for the appellant, that no contract is to be set aside, however fraudulent it may be, unless it operates a prejudice to creditors. But, in the present case, the insolvency of the debtor is manifest; and if, by virtue of this contract, Vionnet is to be paid in preference to ordinary creditors, it is in derogation of their right to participate equally in the common pledge, and consequently the contract is fraudulent as to them.

But the great argument of the counsel for the appellant is grounded upon the fact, that this contract was not entered into within three months preceding the insolvency, and therefore, is not treated as a nullity, under the insolvent laws of this State. He contends for the following proposition as a corollary from article 3323, to wit: that "although a creditor knew of the insolvent circumstances of his debtor when he accepted from him a mortgage to secure an unjust debt, yet the contract is not invalid,

if passed more than three months before the failure." If this proposition were true, those articles of the code, which establish the prescription of one year in relation to the revocatory action, would be wholly useless. It would be, in effect, substituting a prescription of three months in lieu of it. Article 3323 which the counsel supposes sustains him, declares, that "mortgages given and inscribed within three months previous to the failure of the debtor shall be declared null *as presumed to be given* in fraud of other creditors, unless the person in whose favor the mortgage was granted, shall prove that he paid in obtaining it a real and effective value *at the moment of the contract.*" This article merely establishes a presumption of fraud, and then points out the proofs by which it may be repelled. The burden of proof is upon the party claiming under the mortgage. Now, the utmost that can be said, as the converse of such a proposition, would be, that if the mortgage were given more than three months before the failure, it shall *not be presumed fraudulent*—throwing the burden on the other side.

The other article, (1979,) establishes another presumption of fraud against every contract, which may be the subject of the revocatory action, when the obligee knew that the obligor was in insolvent circumstances, and when such contract gives to the obligee, if he be a creditor, any advantage over other creditors. Here is no limitation of time; that limitation is regulated by other provisions of the code which relate to prescription; and we have holden, on more than one occasion, that when the only objection to the contract is an undue preference, the action is absolutely prescribed by the lapse of one year from the date of the contract. Within the year, the contract is liable to be annulled.

An argument is drawn from articles 3325 and 3326, in relation to the inscription of judgments against insolvent debtors. The latter article declares absolutely null, an inscription of a judgment after the failure, or on the day preceding it. The former makes its validity depend on the manner in which the judgment was recovered, if inscribed within ten days preceding the failure. But a fraud, perpetrated by the machinery of a judgment, when the courts themselves are made the unconscious instruments, is as liable to be questioned, and annulled, as when effected in the usual forms of a contract.

Barnett v. His Creditors.

We conclude, that the court did not err in dismissing the opposition.

Judgment affirmed.

JOHN BARNETT V. HIS CREDITORS.

The verdict of a jury will not be disturbed, unless clearly erroneous, especially when pronounced upon questions of fraud.

APPEAL from the District Court of the First District, Buchanan, J.

M. Blache, for the appellant.

Moise, Redmond, Lockett, and Micou, contra.

BULLARD, J.* John Barnett, having made a surrender of his property to his creditors, on the 13th of May, 1840, I. B. Blache made opposition, and prayed, that he be refused the benefit of the laws for the relief of insolvent debtors, on the allegation, that, on the 2d and 4th of May, the said John Barnett had purchased of him, in the name of Samuel Barnett & Co., of which firm he was a member, goods and merchandize to the amount of \$559 7, payable in cash, which goods were delivered to him, and had since been disposed of, or sold by him, or said firm, to the prejudice of the opponent, who has not been paid for the same. That, in so doing, he had committed fraud towards the opposing creditor, and cannot be allowed the benefit of the insolvent laws, and has incurred the penalty inflicted by the same. The defendant answered by a general denial, and prayed for trial by jury.

The opposition was tried by a jury, whose verdict negatived the allegation of fraud, and the opposing creditor has appealed.

It is the constant, and invariable practice of this court, not to disturb the verdicts of juries, unless, in our opinion, clearly contrary to law and evidence; more especially, when they have pronounced upon questions of fraud. In the present case, we have attentively re-examined the evidence, and have come to the conclusion, that

* This case was decided on a re-hearing

Norès and others v. Carraby, Tutor, and others.

there is room for doubt, whether the purchase of the goods was not upon a short credit, and not for cash, within the terms of the statute. The jury may have given the defendant the benefit of that doubt, and we do not deem it our duty to disturb their finding.

Judgment affirmed.

EULALIE NORÈS and others v. ETIENNE CARRABY, Tutor, and others.

Personal property of the parties before marriage, did not, under the Spanish law, become the property of the community, in consequence of the neglect to establish the amount at the time of the marriage.

Every thing left at the dissolution of the community is presumed to be common, unless it be proved what each spouse brought in. This proof is not required to be by an authentic instrument contemporaneous with the marriage; any legal evidence is admissible. The community, as established by the Spanish law, and the code of 1804, remains unchanged in this respect. Whatever either party brought in, is to be deducted from the mass, and the balance alone divided. It will not suffice to show, that either party was possessed of particular property, or had a sum of money previous to the marriage; it must be shown, that it belonged to him at the time of its celebration. An authentic act passed between the parties to a marriage, will not be conclusive against third persons, as to the property possessed by either at the time of such marriage.

Where in an action against a tutor for a settlement of his accounts, plaintiffs moved that the account rendered by the tutor should be homologated so far as it was not opposed by certain creditors, they cannot be permitted afterwards to allege errors therein. By provoking the homologation, plaintiffs waived their right to oppose the account.

Neither the inventory taken after the death of a wife, nor a statement of accounts between the husband and a third person, are evidence against the creditors of the husband, either of the existence, or payment of a debt alleged to be due to the community.

Where it is proved, that notes due to the community were discounted by the husband who received the proceeds, they must be charged to him in a settlement of the community, though no proof was offered of their having been paid by the makers. He should be charged with the amount, unless it were shown that, on a failure of the makers to pay, he was forced to do so.

APPEAL from the Court of Probates of New Orleans, *Bermudez, J.*

Norès and others v. Carraby, Tutor, and others.

Soulé, for the appellants.

Grima and D. Seghers, contra.

BULLARD, J. The heirs of Marie Anne, late wife of Etienne Carraby, instituted the present action to obtain a rendition of an account by their father and natural tutor, of the community formerly existing between him and their mother. An account was rendered accordingly, from which it appeared, that there was a balance in favor of the heirs of \$53,080 99.

In this stage of the proceedings, The Citizen's Bank, The Louisiana State Bank, and D. Seghers, alleging themselves to be creditors of Carraby, intervened, and made opposition to the homologation of the account rendered by him. They charge him with fraud and collusion with his children, to their prejudice: 1st. They deny, that the community which lately existed between the defendant and his deceased wife, is entitled to be credited with all the amounts set forth as forming the assets thereof. 2d. They deny, that the item of sundry debts amounting to \$50,000, or any part thereof, was due to the community; and, if ever due, they deny that any part of it has been paid to Etienne Carraby, particularly \$30,000, by the firm of Norès & Brocard. 3d. They deny, that the two contiguous houses situated in Orleans street, between Royal and Bourbon streets, and the store in Chartres street, belong to the community. They allege, that said property, together with other property situated in St. Peter street, sold by Carraby to Cucullu, and the widow Montegut, was acquired by Carraby during the community, but was not paid for by him. That hence proceeds the judgment for \$62,303 59, obtained in the Court of Probates, by P. Guesnon, executor of Antoine Carraby, against Etienne Carraby, rendered on the 1st of May, 1839. 4th. They allege, that the defendant married on the 4th of July, 1815, and that he possessed previously to, and since his marriage, considerable sums of money, which are not a part of the community of *acquêts* and gains, and which ought to be deducted. 5th. That previous to his marriage, he inherited a considerable sum of money, slaves, and other property from Maria Pradeau, *veuve* Hognon, in all fifty thousand dollars. 6th. They allege, that Carraby, before his marriage, had lent large sums of money on mortgages, which were paid to him after his marriage, and which

Norès and others v. Carraby, Tutor, and others.

form a charge upon the community. They specify \$6393, loaned to Hareng, March 30, 1814 ; and \$7000, to Delino, in August, 1814, which was afterwards paid by Delaronde ; \$2819, the amount of a note drawn by Hareng, in favor of Bourgeois, dated June 4, 1814, which was paid to Carraby, as holder ; \$1415 79, due by Soubercaze to Carraby, and received by him, May, 1815 ; another sum of \$2429, a judgment in favor of Carraby against Livaudais. 7th. They allege, that property was sold by Carraby which he inherited from the *veuve* Hognon, particularly a slave, in February, 1814. The opponents pray, that the account may be amended accordingly.

After these oppositions were filed, and due proof of publication, it was ordered, on the motion of the counsel of the plaintiffs, that the account rendered by Carraby be approved and homologated, except so far as not therein opposed.

The plaintiffs next filed an answer to these oppositions, in which they say, that they had felt it their duty not to discuss any part of the account rendered by their father ; but, that the opponent having contested their whole claim, they now reply, that the items brought to their credit on said account, are correct and true. That since the homologation of the account, they have discovered several sums for which the community was entitled to credit, which have been omitted in said account, and that they were entitled to have the same corrected. They specify an item of \$7500, purporting to have been received from Bellanger, which they say should have been \$13,000 ; a sum of \$3169 89, due by the heirs of Fletcher ; and a further sum of \$15,000, recovered for the community, but which has been omitted. They pray for judgment accordingly.

This proceeding was excepted to by the opposing creditors as irregular, and amounting to an indirect opposition, after the homologation of the account, except so far as it had been formally opposed, on the motion of the plaintiffs themselves.

After a full investigation of the matters of fact, as well as of law, the Court of Probates, being satisfied, that the community was insolvent at the death of Mrs. Carraby, sustained the oppositions, and the plaintiffs appealed.

Before proceeding to investigate the facts disclosed by the evi-

dence, it may be premised, that the question between the intervenors and the plaintiffs, is not so much what is due by their tutor, as, whether the community was insolvent or not; if insolvent, it is of no importance to what extent. If it should appear from the evidence, that the community was solvent, then it becomes important to ascertain the precise amount due to the plaintiffs on that account, because, for that amount, they are entitled to be paid in preference to the intervenors.

It is proper also in this place to say, that we cannot yield our assent to the doctrine contended for by the counsel for the plaintiffs, that, according to the Spanish law, the personal property of the parties before marriage would belong to the community, when they had neglected to establish the amount at the time of the marriage. The expression quoted from Febrero, establishes the same presumption which exists under the new code, that every thing left at the dissolution of the community is presumed common, unless it be proved what each spouse brought in. The proof to be given, need not consist of any authentic document contemporaneous with the marriage. "*Quando no se acredita cuales o quantos llevo cada uno, todos se reputan gananciales.*" Gomez in his Commentaries on the laws of Toro, expresses it as follows: "*Prius et ante omnia deducitur proprium patrimonium et capitale uniuscujusque, vel æstimatio ejus.*" Comm. ad Leges Taurinas, 50, 51, 52, 53, page 622, No. 69; ed. of Madrid, of 1794. The community, as established by the Spanish law, and the Code of 1808, remains unchanged in this respect. Whatever either party brought in, either in money or otherwise, is to be deducted from the mass, and the balance alone divided; and any legal evidence is admissible to prove how much, and what effects, each party possessed before the marriage. It is true, Gomez says, it is advisable to have authentic evidence at the time of the marriage. After saying, that the presumption is in favor of the community, and that, in case of doubt, all the property will be regarded as common, he adds: "*Et sic erit optimum consilium, ut tempore contracti matrimonii fiat scriptura publica de omnibus bonis quæ uterque conjux habet et adducit ad domum; &c.*" *Loco citato*, No. 70.

We do not mean to say, that it will suffice to show, that the

party was possessed of particular property, or had a certain sum of money at a time previous to the marriage ; it must be proved to have belonged to him at the time the marriage was celebrated. But even such authentic act, passed between the parties, would not be conclusive evidence against third persons ; even the numeration of dower must be proved, *quoad* creditors, by evidence *aliunde*.

It is proper in this place, and before entering upon the merits of the case, to say that we think it irregular and erroneous, after the partial homologation of the account rendered by Carraby, to permit the plaintiffs, on whose motion the account was approved, so far as not opposed, to allege errors therein. An opposition, in such a case, requires no answer. The plaintiffs had waived any opposition on their part, to the account so rendered, by provoking the homologation of the account. We shall, therefore, abstain from any examination of those matters, in which the plaintiffs allege there is error to their prejudice in the account.

The debit side of the account rendered, showing the assets of the community, exhibits an amount of \$141,515 47. The credit side, exhibiting the charges upon the mass, amounts to 35,353 76. The balance in favor of the community is, therefore, \$106,161 71. of which the plaintiffs are entitled to one-half. Both sides are contested by the opposing creditors. It is alleged, that Carraby has fraudulently omitted to credit himself with the property he brought into marriage, and has charged himself with property, as belonging to the community, which has never been paid for. We proceed to examine, 1st, the credit side of the account, or the charges against the community, according to the evidence ; and 2d, the assets, or mass of the community.

I. There is an amount of \$35,353, not contested. The opponents allege, under the 6th and 7th heads of opposition, that Carraby, shortly previous to his marriage, had loaned large sums of money, which were repaid during the existence of the community ; and which, consequently, he had a right to withdraw, as forming a charge upon the mass. These different sums are alleged to amount to \$18,612. The evidence shows that, Carraby loaned to Hareng, before his marriage, \$6393, which was repaid afterwards ; to Delino, \$7000 ; to Mrs. Soubercaze, \$1415 79 ;

and that he had a judgment against Livaudais for \$2363 90, which was paid also after the marriage. The total amount which was allowed, is \$17,172 69. The amount loaned to Hareng is contested. It is asserted, that it was the money of Antoine Carraby. We are not authorized to draw that conclusion, from the simple fact that it was paid to him, especially, when it appears by two authentic acts, that the sum was loaned by Etienne Carraby, and that the mortgage, taken to secure the loan, was still his property in 1817. This amount, added to the \$35,353, brings the charges up to \$52,525 69.

The next, and most important item, is a judgment of the Probate Court, in favor of the representatives of Antoine Carraby against Etienne Carraby, for \$62,303 68. This was a debt of the community, contracted during its existence, principally for the purchase of property belonging to the estate of Antoine Carraby. This judgment, has since been reduced to \$27,638 03, in consequence of claims of Etienne Carraby, against the estate of his brother, for a legacy left him by the will of Antoine Carraby, and moneys paid by him, to other legatees. Those sums which went in compensation, were independent of the community, except about \$10,645 44; so that the balance of the original judgment, after deducting that amount, is still a charge upon the estate: that is to say, \$51,658 24; and that sum, added to the amount above stated of \$52, 525 69, shows a total of charges against the community of \$104,183 93.

II. We come, in the second place, to examine the other side of the account, representing the assets of the community, which appear to amount to \$141,515 47.

The next important item, which it is contended, ought to be struck from the account, is a debt alleged to have been owing to the community, by Norès & Brocard, two sons in law of Carraby, which they repaid to him after the death of Mrs. Carraby. This payment is earnestly contested, and the Court of Probates rejected it.

We concur with the court below in the opinion, that neither the inventory taken after the death of Mrs. Carraby, nor a statement of accounts between Carraby and Norès & Brocard, furnish evidence against the opposing creditors, either of the existence or

subsequent payment of that debt. It is probable, indeed, that Carraby assisted his sons in law in going into business, before the death of his wife ; but the extent of his advances is not shown by any satisfactory evidence. Neither the nature of the trade in which they were engaged, nor the capital apparently employed, nor the parol evidence in the record, justify the belief, that so large an amount as thirty thousand dollars, was either advanced or refunded. Norès & Brocard failed, and made a surrender shortly afterwards. Their books, which although not properly evidence, appear to have been used as such, are far from proving this item of the account. The testimonial proof on this point, is vague and unsatisfactory, and the family connection of the parties, while it may furnish an excuse for some carelessness in keeping the accounts, does not prove the payment of so large a sum. Many important entries, in the books of Norès & Brocard are in the handwriting of Carraby, and the manner in which the books have been kept, is not calculated to inspire confidence in their entire correctness. We, therefore, concur with the court below, in the opinion, that this item is not supported by sufficient legal evidence.

The Court of Probates rejected several items, amounting together to \$3,637 38, composed of notes for different amounts, due to the community by Espinosa, Petitpain, Leaumont and Davenport. It was in proof, that Carraby had these notes discounted through a broker, who testifies to the fact. They were rejected as a charge against Carraby, because, it was not shown that they had been paid by the makers. The court, in our opinion, erred. When Carraby discounted the notes and received the money for them, they were paid, so far as he was concerned ; and he was chargeable with the amount, unless it be shown, that, on a failure of the makers to pay, he was compelled to do so, as endorser, and thus became repossessed of the notes. This amount must, therefore, be reinstated. The difference between \$3637 38 and \$30,000, to wit, \$26,362 62, must be deducted from the original amount of assets, and leaves a balance of \$115,152 38.

The court rejected another item, \$7425 22, made up of a claim on Philip Guesnon, for \$1000, and another of \$1624 ; a claim on Omer Guesnon for \$2000 ; a claim on Mrs. Collson for

Preston, Executor, v. Humphreys and others.

\$1720; a claim on Mrs. Henry for \$920; and one on Larochette for \$100; and on Le Bourgeois for \$61. There is no evidence to show, that those items form a proper charge in the account against Carraby, and the court did not err in rejecting them.

We have already expressed our opinion, that the court erred, in permitting the plaintiffs to bring forward any new charge against the defendant, after the partial homologation of the account on their motion. It follows, that a sum of \$5500, which was allowed them, on account of the Bellanger transaction, as an additional charge against their father, is to be rejected. This last sum, added to the above \$7425 22, in all \$12,925 22, being deducted from the amount of assets already stated, leaves a balance \$102,227 16, which falls short of the charges.

It is useless to carry our inquiries any further. If the community was insolvent, as we do not doubt according to the evidence before us, the opposing creditors have made good their opposition, and have no interest in further scrutinizing the accounts between the parties. If it be shown, that the plaintiffs have no claim against their tutor, growing out of the settlement of the community, then the opposing creditors are to be paid in preference to the plaintiffs. It was only so far, as the plaintiffs might have a legal mortgage on the estate of their father, that the opposing creditors had any interest in contesting their claims. Notwithstanding some differences of opinion, upon some of the questions of law which the case presents, we concur with the Court of Probates in the result, that the opposition must be sustained.

Judgment affirmed.

ISAAC T. PRESTON, Testamentary Executor of James Brown, deceased, v. FRANCIS ANN HUMPHREYS and others, Heirs of John Brown Humphreys, deceased.

A wife has no power to alienate any part of the real or personal estate of the community, or to throw any obstacle in the way of its disposition by the husband, during the existence of the community. But she may dispose of her private estate, and consequently of that portion of the community property, which, after her death and the settlement of the community, may become part of her estate.

Preston, Executor, v. Humphreys and others.

Where subsequently to the date of a will by which the wife bequeathed all her interest in certain community property, but before the dissolution of the community by the death of the wife, the husband sells the property to the devisee, there is an end of the devise, which is ambulatory and without effect until the death of the testatrix. Had there been no sale, the devisee might, after the settlement of the community, have claimed the interest under her will.

The legatees of the husband or wife, have no claim against the community until all its debts are paid.

APPEAL from the District Court of the First District, *Buchanan, J.* The executor of James Brown, deceased, is appellant from a judgment rendered against him, in an action to recover of the heirs of John B. Humphreys, a balance due for the price of one-sixth part of a sugar plantation, sold by Brown to their ancestor. The material facts of the case are stated in the opinion of the court.

R. H. Chinn, for the appellant.

Henry Clay, on the same side. Brown being the sole owner of a sugar plantation on the German Coast in Louisiana, sold one-third of it to J. B. Humphreys in 1816, and entered into a partnership with him, to conduct it for the term of ten years. That partnership expired in 1826, and between that period, and 1830, Brown sold to Humphreys one-sixth of the plantation, making Humphreys' interest a moiety. The sale was effected by an interchange of letters between the parties, and was reduced to an authentic act before a notary, on the 14th May, 1830. This act stipulated, on the part of Humphreys, for the payment of \$18,000, for the sixth part, and the payment was to be made out of Humphreys' proceeds of the plantation; but if not completed by the 1st of January, 1834, it was then to be made by him. It is expressly admitted, that only \$9000 of the \$18,000, the price of the one-sixth, has been paid. How, then, are the defendants to escape from its payment? They rely upon a provision in the will of Mrs. Brown; and this brings us to the consideration of that document, out of which arises the only question in the case.

The intention of the testator is the fundamental, imperative, and controlling law of wills. It is to be sought for, disregarding all technicalities, all ungrammatical expressions, all imperfections of language. It is to be sought for, too, by a full and candid view of the whole instrument, and not of its broken and detached parts.

When found, if not contrary to law, it is to be faithfully executed. With these guides, let us endeavor to ascertain what was Mrs. Brown's intention, in the parts of her will which have been relied on.

Humphreys had bought, in 1816, and obtained, a title to one-third. He had purchased, between 1826 and 1830, one-sixth, to complete his half; but the evidence of the purchase was to be found in letters which had been interchanged between the parties. This, Mrs. Brown probably knew. In July, 1839, she made her will, in that state of the second purchase of Humphreys, and before it had been reduced to writing by the act of 14th of May, 1830. The facts just stated, and the simple reading of the clause of the will, demonstrate the clear object of the testatrix to have been, simply to secure to Humphreys the legal title to the one-sixth. *That* was the only object. Let us look at extraneous circumstances, as well as at the testamentary language. Humphreys was no blood relation of Mrs. Brown. He was in easy, if not opulent circumstances. She had a mother, two sisters, the descendants of two others, and of a brother—in all, six persons, or their descendants, standing in the nearest of all human relations to her, except those of husband and children. They, or some of them, were poor. Her portion of the estate was \$26,000, which, divided into six parts, would be for each a little over \$4000. Is it credible, that she intended to bequeath to J. B. Humphreys \$9000, and to her own mother and sisters only about \$4000 each?

But let us return to the will. She bequeathed to Mr. Brown, all other sums due to him. This included the debt due by J. B. Humphreys. This bequest is perfectly consistent with the subsequent devise to Humphreys in respect to title. A will must be so constructed as to give effect to all and each of its parts. But it is contended, on the other side, that although the bequest comprehends the debt of Humphreys, it comprehends it in general terms, and that the subsequent devise to Humphreys is an exception. The general principle is admitted; but the exception which is to qualify a general grant or bequest, must be a clear case of exception—not of doubtful and strained interpretation. It should have clearly devised the debt of Humphreys to him. But what

Preston, Executor, v. Humphreys and others.

is the language of the will? It is a devise, not of a debt, but of a legal title, which Mr. Brown is requested to make. Is it not going too far to say, that a title to real estate and a debt—that a reality and a chose in action, are synonymous and identical? and is not *that* a strained and illegitimate inference, which supposes that the testatrix, in providing for the quieting of a title, intended to give up, or release a large debt? But Mrs. Brown was not competent to release a debt due to her husband. In conclusion, the debt due by Humphreys is a valid one. No prescription bars it—no payment. It has been attempted to discharge it by a syllogism—a strained implication—an inference extorted from repugnant premises.

T. Slidell, for the defendants. It is important to ascertain, at the out-set, by the rules of what jurisdiction this will should be interpreted. This will is not dated at any place*, nor does it ap-

The will of Mrs. Brown is in the following words:—

“I, Nancy Brown, being in sound mind and memory do make the following, as my last and only will and testament.

“I give to my husband James Brown absolutely and unconditionally all the property, to which I may be entitled, *not lying in the State of Louisiana*, and direct that all such sums of money as may be due and owing to my said husband and myself, now in the hands and control of our agents Daniel W. Coxe of Philadelphia, and John Jacob Astor of New York, a debt due to my husband from Thomas H. Benton of Missouri, and a debt due from Mr. Cole Belford of Washington, for which he, my said husband, holds their notes, may, together with other sums due to him, may be paid to my said husband, on his simple receipt, which shall be sufficient to discharge the same.

“My nephew, John B. Humphreys of Louisiana, having a legal title to one-third part of the estate bought by my husband on German Coast, in La., consisting in land, negroes, sugar establishments, stock and other property found thereon, and he, the said Humphreys, having since purchased of my husband one other sixth part of said estate for which he has not yet received a legal title, I do will and devise to him all my interest in such sixth part, and do authorize and request my husband to make him a deed for the said sixth, so that he may hold the said German Coast estate as partner equal joint proprietor with my husband, to whom I will and devise the interest I have in same, and the negroes and every thing thereon to be held, used, occupied and enjoyed by my husband during his lifetime.—And it is my will that at his death *my legal portion thereof, that is to say, one-fourth* part of the said German Coast estate, should descend to such of my brothers and sisters, or brothers' and

Preston, Executor, v. Humphreys and others.

pear by testimony, *dehors* the will, where it was written. But the domicil of the testatrix was in Louisiana.

There is no doubt, that a will of real estate must be interpreted according to the law *rei sitæ*—of the country where the land lies, especially when that country is the domicil of the testator. It is now also well settled, that the interpretation of a will, especially a will written and prepared by the testator himself, must be interpreted with reference to the law of his domicil, if it be a moveable which is the subject of the disputed part of the will.

Story, in his Conflict of Laws, p. 409, says: "In another case, the same principle was adopted, and the court laid down the rule, that in the construction of a will, the *lex domicilii* must govern, unless there is sufficient on its face to show a different intention in the testator. The facts were these. A lady, a native of Scotland, was domiciled in England. On a visit to Edinburgh, she made a will entirely in the Scotch form, and it was deposited with

sisters' descendants as by the law of Louisiana, would be entitled to the same, had I died intestate, and that the other fourth of said estate should be passed as my husband may direct.

"It is my will and desire that my husband shall, immediately after my death, enter into possession of all the estate and property we jointly hold, without inventory, expense or intervention of justice, provided the laws will permit this to be done, and the partnership between him and my nephew John B. Humphreys continue, but if it be necessary to appoint executors, then I appoint Henry Clay, and Thomas Smith, the first my brother in law, the latter my nephew, as executors of this my last will and testament.

"I give to my mother during her life annually, the sum of five hundred dollars, to be paid by my husband out of the funds and revenues hereby bequeathed to him.

"I give to my sister Susan Price, five hundred dollars to be paid to her annually during her life, or until the death of my husband, to be paid by him out of the said estate.

"I recommend my relations generally to the kindness of my husband, convinced that he will feel pleasure in giving all the pecuniary assistance which his means will permit.

"The whole of this will, by which I revoke all former wills made by me, is written with my own hand, and signed this third day of July, in the year of our Lord, one thousand eight hundred and twenty-nine.

NANCY BROWN.

the writer at Edinburgh. She had personalty in England only, and died in England. Scotland, then, was the *domicilium originis et forum contractus*; but, on the other hand, England was the *forum domicilii*, and the *locus rei sitæ*. The question was, whether by the legatee's death, in the lifetime of the testatrix, the legacy lapsed according to the law of England, or survived to the legatee's representatives according to the laws of Scotland. The court decided, that being domiciled in England, it was to be presumed, that she intended the law of England to be applied; and that there was not enough in the will to repel that presumption."

To the same effect is the language of the Supreme Court of the United States in the case of *Harrison v. Nixon*, 9 Peters, 503.

"The present is the case of a will, and so far at least as the matter of the bill is concerned, is exclusively confined to personalty bequeathed by that will. And the court are called upon to give a construction to the terms of the will, and in an especial manner, to ascertain who is meant by the words "heir at law," in the leading bequest in the will. The language of wills is not of universal interpretation, having the same precise import in all countries, and under all circumstances. They are supposed to speak the sense of the testator, according to the laws or usages of the country where he is domiciled, by a sort of tacit reference; unless there is something in the language which repels or controls such a conclusion. In regard to personalty, in an especial manner, the law of the place of the testator's domicile governs in the distribution thereof, and will govern in the interpretation of wills thereof; unless it is manifest that the testator had the laws of some other country in his own view.

"No one can doubt, if a testator born and domiciled in England during his whole life, should, by his will, give his personal estate to his heir at law, that the *descriptio personæ* would have reference to, and be governed by, the import of the terms in the sense of the laws of England. The import of them might be very different, if the testator were born and domiciled in France, Louisiana, Pennsylvania or Massachusetts. In short, a will of personalty speaks according to the laws of the testator's domicile, where there are no other circumstances to control their application; and to raise the question, what the testator means, we must

first ascertain what was his domicile, and whether he had reference to the laws of that place, or to the laws of any foreign country. Now, the very gist of the present controversy turns upon the point, who were the person or persons intended to be designated by the testator, under the appellation of "heir at law." If, at the time of making his will, and at his death, he was domiciled in England, and had a reference to its laws, the designation might indicate a very different person, or persons, from what might be the case, (we do not say what is the case,) if, at the time of making his will, and of his death, he was domiciled in Pennsylvania. In order to raise the question of the true interpretation and designation, it seems to us indispensable that the country, by whose laws his will is to be interpreted, should be first ascertained: and then the inquiry is naturally presented, what the provisions of those laws are."

We, therefore, feel authorized, in considering the language and investigating the meaning of this will, to invoke the principles of law established by the Code of Louisiana, and recognized in the civil law, which forms its basis.

By the law of community which prevails in Louisiana, Mrs. Brown was the equal partner with her husband, in the subject of the donation (*mortis causa*) to Humphreys. Whether the interest of Mrs. Brown, in the one-sixth of the plantation spoken of in the will, was real estate or the price of real estate, is immaterial as regards the community rights of Mrs. Brown. If death had overtaken her the instant after the signature of her will, what difference would it have made as regards the share appertaining to her succession, whether it was real estate, or the price of real estate? In either case, one-half of the one-sixth, be it the price or the land, would have belonged to her succession, and would have been subject to her testamentary control.

Now, if at the date of the will, 23d July, 1829, we consider the contract of sale as not complete, and that it was a mere expected contract, yet in embryo, and not having yet assumed such a distinct form as would mutually have imposed on the parties, Brown and Humphreys, the obligations of buyer and seller, then was the one-sixth, at the date of the will, real estate of the community, and, therefore, not comprised in the first clause of the

will, which is a bequest to James Brown of moveables only. There would then be not the shadow of inconsistency, between the donation to Brown and that to Humphreys. For it is clear, that, in the civil law, where debts are bequeathed, unless there be an express or strong inferential inclusion of future debts, those debts only pass which existed at the date of the will. Pothier, in his Treatise on Wills, lays down the following rules :

“Une disposition conçue par termes du présent ou du passé, ne s'étend pas à ce qui survient depuis. Par exemple, si quelqu'un a légué ainsi : je lègue à Pierre ce qu'il me doit, ou ce que je lui ai prêté, le legs ne s'étend pas aux nouvelles dettes que Pierre aurait contractées depuis le testament envers le testateur. Œuvres, vol. 10, p. 596, ed. of Paris, by Dupin, of 1827, and vol. 7, p. 409.

Une disposition qui, dans les termes dans lesquels elle est conçue, n'exprime ni temps présent ni passé, ni futur, se rapporte ordinairement au temps du testament.—Par exemple, si j'ai légué à quelqu'un mon argenterie, le legs ne comprend que celle que j'avais lors de mon testament, et non celle que j'aurais acquise depuis. *Cum dicit argentum meum, hac demonstratione, meum, præsens, non futurum tempus ostendit.*”

So, the Civil Code, art. 1713. A disposition couched in terms present and past, does not extend to that which comes afterwards.

For example, a legacy of all the books a testator possesses, does not include those which he has purchased after the date of the testament.

Art. 1715. A disposition, the terms of which express no time, past or future, refers to the time of making the will.

Thus, when the testator expresses simply, that he bequeaths his plate to such a one, the plate that he possesses at the date of his will is only included.

But, on the other hand, if, at the date of the will, the interest was not an immoveable, but was an interest in the price of a binding contract for a sale of the one-sixth, how then does the question stand ?

It is said by the plaintiff, if you treat the interest in the one-sixth belonging to Mrs. Brown, as being, at the date of her will,

Preston, Executor, v. Humphreys and others.

not real estate, but the price of real estate, then was it bequeathed to James Brown by the first clause of the testament. We deny it—and we appeal to well established rules of interpretation. We say that a legacy of objects under a generic name or description, does not comprise particular objects, coming under the same generic description, which are specially bequeathed to another legatee.

“Un legs général ne comprend pas les choses comprises sous ce genre, qui ont été léguées en particulier à d'autres personnes.

C'est une suite de cette règle, *in toto jure generi per speciem derogatur, et illud potissimum habetur quod ad speciem directum est.* L. 80, ff. de reg. jur.

Par exemple, si j'ai légué à quelqu'un toutes les provisions de bouche qui se trouveront lors de ma mort, et que j'aie légué à un autre le vin qui se trouvera dans ma cave lors de ma mort; quoique ce vin soit compris sous ce terme général de provisions de bouche, il ne sera pas néanmoins compris dans le legs général, parce que le testateur en a disposé envers un autre.” Pothier. Testaments, vol. 10, p. 593, vol. 7, p. 406.

To the same effect, is the Civil Code, art. 1712. A general legacy does not embrace the things included under the genus, which have been bequeathed, in particular, to other persons.

Moreover, in case of doubt, and of discrepancy, a latter clause in a will overrules an earlier clause in the same will. *In testamentis novissimæ scripturæ valent.* L. 12 and 13, ff. de leg. 1.

“Ce qui est écrit en dernier lieu est présumé contenir la volonté en laquelle le testateur a persévéré, et contenir une dérogation à ce qu'il a écrit auparavant de contraire.” Pothier, vol. 10, p. 598, vol. 7, p. 411.

“When a person has ordered two things which are contradictory, that which is last written is presumed to be the will of the testator, in which he has persevered, and a derogation to what has before been written to the contrary.” Civil Code, art. 1716.

See also Lord Alvanley's opinion, in 5 Vesey, 247.

If these principles of interpretation be just and reasonable, it is in vain to say, that the devise to Humphreys should yield to the bequest to Brown. The very reverse results from the authorities.

It is, however, ingeniously contended by the plaintiff, that the clause in favor of Humphreys is a mere instruction to Brown by his partner in community, to carry out the contemplated sale of the one-sixth.

In interpreting this clause, we are bound to observe the following well recognized rules of interpretation. We must consider the words in their natural meaning.

"Il ne faut pas néanmoins s'écarter de la signification propre des termes du testament, s'il n'y a pas de justes raisons de croire que le testateur les a entendus dans un autre sens que leur sens naturel." Pothier, vol. 10, p. 587, vol. 7, p. 344.

Our code, art. 1705, says; "In the interpretation of acts of last will, the intention of the testator must principally be endeavored to be ascertained, without departing, however, from the proper signification of the terms of the testament."

Besides, where words have obtained a precise technical meaning, we ought not to give them a different meaning. It was said by a learned English judge, Lord Kenyon; "It is our duty in construing a will to give effect to the devisor's intention, as far as we can consistently with the rules of law, not conjecturing but expounding his will from the words used. Where certain words have obtained a precise technical meaning, we ought not to give them a different meaning; that would be, as Lord King and other judges have said, removing land marks."

Applying these principles which harmonize and concur in this case, let us inquire what is both the natural meaning, and the technical meaning, of the expressions used by the testatrix. The words are, "*I will and devise to him all my interest in said sixth part.*" Can any thing be more plain than, that these expressions import a donation. To devise, says Johnson, is to grant by will. A devise, says he, is the act of giving or bequeathing by will. Its legal and technical meaning is precisely the same.

Moreover, how is it possible to overlook the fact that, in the very same clause, she uses the very same words. "*I will and devise the interest I have in same,*" when she is giving to her husband the usufruct of the remaining fourth. The truth is, the expressions cannot be distorted from their natural meaning without violence to the context, and an utter disregard of the sense of the

same terms as used elsewhere in the will. The language certainly imports a donation, and nothing but the most pressing and insuperable reasons, fairly deducible from the rest of the instrument, should be permitted to cloud their meaning, and create a doubt of the *beneficent* intention of the testatrix towards Humphreys.

But it was said in argument by the distinguished counsel of the plaintiff—"the clause is a devise of title—it was intended to operate as a renunciation of the dotal and paraphernal rights of Mrs. Brown, upon the one-sixth of the plantation and slaves." Now it is to be observed, that it has not been shown that Mrs. Brown had either dotal or paraphernal claims; and in the absence of all evidence, such claims are not to be presumed. But if such was her object, why use the expression "my interest in such sixth part"—the natural expression would have been, "I abandon my claims or my liens upon such part."

If Mrs. Brown is to be considered, on the other hand, as having in view the object, which has been alternatively suggested by the plaintiff, of requesting her husband to go on and complete his contract with Humphreys, we meet with a double difficulty. It is not to be supposed, that a wife would think it necessary to request her husband to carry out honestly and fairly a contract he had made. And, moreover, the husband, being the head of the community and his contracts being binding on it, it would have been a mere piece of supererogation to give her authorization to the sale.

A will, like any other instrument, should never be so construed if it be possible to avoid it by any reasonable interpretation, as to contain a useless and vain order or direction.

"C'est encore une juste raison d'entendre les termes dont le testateur s'est servi dans un autre sens que leur sens naturel, puisque, s'ils étaient pris dans leur sens naturel, ils exprimeraient quelque chose que le testateur n'aurait pu ordonner, ou *aurait inutilement ordonné.*" Pothier, vol. 7, p. 400.

"The grand maxim in the construction of wills in law and equity (for the rules are the same in both, and the latter has no greater latitude in this respect than in the former,) is, that the court is bound to find out the intention of the testator, if it be

possible so to do, however inartificially the will may be expressed, and to make such a construction as will effectuate that intention. This is often a difficult task; for, as Lord Northington remarks, it is the fate of all courts of justice upon wills to be the authorized interpreters of nonsense, and to find the meaning of persons that had no meaning at all. The intention is to be collected, not from any particular or detached clause of the will, but from the whole taken together, and from any codicil which forms a part of it. Every word is to have its effect, provided an effect can be given to it not inconsistent with the general intent of the whole will taken together, for a testator is not to be supposed to have used words without meaning, if it is possible to give them a consistent meaning; and the rule is not to reject any words, unless there can not be any rational construction of these words as they stand." Ward on Legacy, p. 100.

It has been well said, that the intention of the testator is the polar star that should always guide in the interpretation of a will, and when this intention is distinctly announced in plain and intelligible language in the instrument itself, it would not only be unreasonable, but illegal, to look elsewhere.

It is evident, that Mrs. Brown considered that there was an efficient and binding contract between her husband and Humphreys for the sale of the one-sixth, for she devises to her husband a life estate in the interest she has in the plantation and slaves, which interest she presently afterwards, in the very same clause, defines to be one-fourth part. Thus treating the share of the real estate (properly speaking) existing in herself as but a fourth, and treating the one-sixth as virtually gone from the community, though the legal title still remained. Mrs. Brown, who is to be, like every other testator, supposed to have known the laws of her country, knew that the price of the one-sixth was just as much a part of the community property, as that interest in the land, had it remained unsold, would have been. And indeed, it would seem that the clause had been studiously framed to cover the interest in the one-sixth, in whatever shape, whether of land or price, it should exist at her death.

Much was said in argument of the improbability of Mrs. Brown bequeathing \$9000 to Humphreys, and smaller sums to her

mother and sisters. It is submitted, that, in the first place, she owed to her husband's industry, and prudence, so far as we may judge from the record, all that she was disposing of by her will. Now, a sense of propriety and justice would very naturally dictate, that she should leave to a relative of her husband, whose activity and fidelity had largely contributed to her husband's fortune, a portion of that property, which, by a most unreasonable and oppressive fiction, our law considers the result of the common industry of man and wife. And, moreover, any one who reads the will of Mrs. Brown, though it be an olographic will, and of course written throughout with her own hand, must feel, that no woman, but on the contrary, a man, and a professional man too, prepared the draft of it. James Brown himself was no doubt the author of that will; and as he exerted his marital influence in carefully guarding his own interests in that instrument, which was in truth a disposition of one-half of the fruits of his own labors and prudence, it is not at all strange, that John Brown Humphreys, his blood relative, and who had faithfully served him for nearly twenty years, should also have been duly considered.

It is not pretended that Mrs. Brown [or Mr. Brown we should rather say] might not have drawn this will, with more complete perspicuity; the instrument, however, is sufficiently plain, and is not attended with a greater share of ambiguity than is usually exhibited in last wills. This species of instrument seems more than any other to be prone to ambiguity; and it would be a hard task for even an old and experienced lawyer to draw a will, at all extended in its provisions, that would not be, in some things, obscure. Sir John Bland, we are told, made his own will, and at the close of it said, that he had disposed of his estate in so clear a manner, that he thought it impossible for any lawyer to doubt about it. This will was afterwards contested, and it came before Lord Hardwicke, who said, that he was at loss to conceive what was the real intention of the testator; that he wished he could find *some ground on which to form a conjecture.*

The point was raised by one of the counsel, that the devise to Humphreys lapsed by reason of the subsequent conveyance of the one-sixth. We have endeavored to show, that the language of the testatrix was so framed as to cover her interest in the land, or its

Preston, Executor, v. Humphreys and others.

price. But were it not so, it will be remembered, that the doctrine that a sale subsequent to the making of the will revokes tacitly the legacy of the thing sold, rests upon the principle of a change of intention in the mind of the testator. Here, no such change of intention is inferable; for the sale had been long in contemplation, and the very words of the testatrix evince her knowledge of its being in contemplation, and point to its expected consummation.

MARTIN, J. The plaintiff seeks to recover the balance of the price of an undivided sixth part of a sugar estate, sold by his testator to the defendants' ancestor. They set up a claim under the will of the testator's wife; and aver, that all demands of the testator on their ancestor, or his estate, have been settled and discharged. They had a verdict and judgment, and the plaintiff appealed. The clause of the will under which they claim is in the following words: "My nephew, John B. Humphreys of Louisiana, having a legal title to one-third part of the estate bought by my husband on German Coast in Louisiana, consisting in land, negroes, sugar establishments, stock, and other property found thereon, and he, the said Humphreys having since purchased of my husband, one other sixth part of said estate, for which he has not yet received a legal title, I do will and devise to him, all my interest in such sixth part, and do authorize and request my husband to make him a deed for the said sixth, so that he may hold the said German Coast estate as partner, equal joint proprietor with my husband." The sixth part of the estate spoken of in the above clause, is the same which was sold by the testator to the defendant's ancestor, and for which the latter promised to pay eighteen thousand dollars, a sum which is admitted to have been reduced by partial payments, during the life of the testator and since, to nine thousand dollars. The will bears date the 3d day of July, 1829; the act of sale, the 14th of May, of the succeeding year; and the testatrix died on the 20th of October, of that year. The power of the wife to alienate any part of the real or personal estate of the community, or to put any obstacle to the disposition of it by her husband, during the existence of the community, can not be contended for. She has, however, that of disposing of her private estate, and consequently of that portion of the community property which, after her death, and the settle-

ment of the community, may become part of her estate. If her husband had not, according to her desire, executed the act of sale before us, the affairs of the community being settled, and one-half of the undivided sixth part of the plantation fallen into her estate, there cannot be any doubt that the defendants could claim it under her devise. But that sixth part having been sold during the existence of the community, and before her death, there was an end to the devise; for a devise is an alienation, is ambulatory during the life of the testator, and has no effect until the breath goes out of his body. At the death of the testatrix, therefore, she had no longer the power of alienating the land devised.

But it is contended, that the devise was not of the land itself, but of the testatrix's interest therein; that the defendants' ancestor was the equitable owner of it, or rather had a right of demanding a legal title on paying the price; that her interest was therefore, in the price, and that it was her share of that price which she bequeathed. This may be undeniable, although the plaintiff's counsel denies it. Admitting that it is, the part of the price bequeathed was a legacy which ought to be applied for to the testatrix's executors. It cannot be retained, and withheld from the plaintiff, because it is a part of the assets of the community, on which neither the legatees of the husband, nor of the wife, can have any claim in opposition to the creditors of the community, *id est*, until all its debts are paid. The defendants, after having complied with the obligations of their ancestor, by paying the price of the property he purchased, may enforce their rights under Mrs. Brown's will against her executors, on what remains of her estate after her creditors have been satisfied, provided such executors receive, on the settlement of the affairs of the community, a sum sufficient to discharge the legacy.

It is, therefore, ordered and decreed, that the judgment be annulled and reversed, and that the plaintiff recover from the defendants, the sum of nine thousand dollars, with interest at the rate of five per cent per annum, from the 1st of January, 1834, the period on which the payment of the price of the estate was to be completed, with costs in both courts.

CAROLINE BARNES and others v. MYRA GAINES and Husband.

The word "*actual*" in art. 43, of the Code of Practice, which requires that a petitory action must be brought against the person in actual possession of the immovable, does not mean strictly a natural or corporeal possession, in the sense of arts. 3391, 3393, of the Civil Code. It applies to a civil, as well as to a natural possession, where the defendant pretends to possess as owner. The civil possession of the defendant at the time of suit, preceded by an actual corporeal detention of the property, will suffice.

Petitory actions, or actions of revendication, must be brought before the ordinary tribunals, even when instituted against successions. C. P. 983.

Clauses in a will limiting the testatrix's power to dispose of the legacies after their reversion to herself, are nugatory, and do not amount to a substitution.

Where a testatrix directed by her will "that in case any of the legatees should die before her, the share of the deceased legatee shall go to his children, their heirs or assigns," and this direction was not changed by her, after the death of the legatee: *Held*, that this clause does not contain a substitution; that the death of either of the legatees before the testatrix, could not prevent her from disposing of her property as she pleased in favor of any other persons; and that the right of the legatee, first instituted, not having accrued, the children, the eventual legatees, would take under the will, without reference to the previous institution.

APPEAL from the District Court of the First District, *Buchanan, J.*

SIMON, J.* The plaintiffs, who style themselves the testamentary heirs of Mary Clark, each for one-fourth part of her estate, as bequeathed to them respectively by the last will of the said Mary Clark, who, it is alleged, was the instituted universal heir, and legatee of Daniel Clark, her late husband, as appears by his last will and testament, bearing date the 20th of May, 1811, duly admitted to probate, represent that said Daniel Clark, at the time of his death, was seised and possessed, in full ownership, of the property described in the petition, all situated and lying in the *Faubourg St. John*, in the City of New Orleans; that the whole of said property was acquired by Daniel Clark, and is embraced in the limits of three several purchases made by him

*MARTIN, J., being interested in the question, did not sit on the argument of this case.

from the individuals named in said petition; that as the heirs and legal representatives of Mary Clark, and of Daniel Clark, they are legally entitled to the possession, and ownership of all the lots, and squares of ground described in their petition, in the proportion of one undivided fourth part to each of the petitioners; but that the defendants have unlawfully, and without any just or legal title, taken possession of all the said lots and squares of ground, and refuse to deliver possession thereof to the petitioners, who also allege, that the rents and profits issuing out of the same, amount to \$20,000: wherefore, they pray, that judgment may be rendered in their favor against the defendants, decreeing the whole of the said property to belong to them, the plaintiffs, each for the one undivided fourth part thereof; that should any legal impediment arise to the recovery by one or more of the petitioners, then that the share, or shares, of those thus excluded may, upon the principles of accretion, enure to and be received by those whose claims are not obnoxious to the like legal impediments; and that judgment be also rendered against the defendants, for the sum of \$20,000, rents and profits.

The defendants first made application for the removal of this cause to the Circuit Court of the United States, for the Ninth Circuit, and Western District of the State of Louisiana, which application was refused; whereupon they filed their exceptions and answer, in which they state, that before the institution of this suit, there was pending before the United States Circuit Court, a certain suit in chancery, wherein the respondents are complainants, and the plaintiffs defendants; which suit is still pending, and involves all the subject matter sought to be involved in this action. Wherefore, they pray, that the present suit may be dismissed. But if these exceptions be overruled, said defendants deny all the allegations contained in the plaintiffs' petition.

Under these pleadings, this cause was tried before a jury, who were unable to agree upon a verdict, and they having been discharged, the suit was continued. A few days afterwards, the defendants obtained leave to file a further and amendatory answer, alleging that they are not now, nor were they at the time of the inception of this suit, nor have they ever been, at any other time, in the actual, natural, civil, or any other kind of possession

of the property in question ; they moreover deny, that any amicable demand to deliver up the possession of the property was ever made by the plaintiffs ; they deny, that the property claimed belongs to the succession of Mary Clark ; and deny all the allegations contained in the petition.

In this situation, the case was tried before a second jury. During the trial, on the production by the defendants of a letter from Jane Campbell, one of the plaintiffs, and on the motion of said plaintiff's counsel, the suit was discontinued as to the said Jane Campbell ; and the jury having returned a verdict for the defendants, the plaintiffs, attempted to obtain a new trial, which was refused by the Judge, *a quo*, although, in his opinion, the verdict was contrary to law and evidence ; whereupon, the inferior court rendered its judgment agreeably to the verdict, and the plaintiffs appealed. The reasons assigned by the Judge for overruling the plaintiff's motion for a new trial are, that the cause had already been before the two juries ; that very extraordinary efforts had been made to influence public opinion through the newspapers, in relation to this cause, which rendered it more than probable, that it would be difficult to empanel an entirely unbiassed jury ; and that, under such circumstances, if a new trial should be allowed, there was too much reason to fear a series of mistrials to the ultimate injury, if not sacrifice of the rights of the parties.

No attempt has been made, or renewed before us, for the removal of this cause to the United States' Circuit Court, and we must consider this as abandoned by the defendants. With regard to the plea of *litis pendentia*, the record contains no evidence to sustain it, and we shall, therefore, proceed to examine the case upon its merits, as presented by the pleadings and the evidence.

This is a petitory action, which appears to be resisted by the defendants upon three distinct grounds ; 1st. That the plaintiffs have not shown, and cannot show, that the defendants ever were in the actual possession of the property sued for, nor that they were in actual possession at the time, that this suit was instituted. It is contended, that no petitory action can be maintained without this proof. 2d. That the plaintiffs, have not shown

themselves to be the owners of the property. 3d. That the will of Mary Clark, under whom they claim, is void on account of containing clauses of substitution.

I. In support of this ground of defence, which was made the subject of an amended answer filed after the first trial, in which the want of actual possession is specially pleaded, the defendants' counsel relies upon the 43d art., of the Code of Practice, which says: "The petitory action, or one by which real property is claimed, must be brought against the person who is *in the actual possession of the immovable*;" and hence it is inferred, that unless the plaintiffs show, that the defendants were, at the time of the institution of this suit, in the actual, nay, in the natural, or corporeal possession of the property in dispute, they cannot maintain it. It is first worthy of notice, that the defendants did not disclaim, in their first answer, the possession alleged in the petition, but joined issue on the merits. Could they do it to any effect, by the special plea contained in their subsequent and amended answer? This is a question which does not appear to have been made in the court below, as the filing of the amendatory answer was not opposed or objected to.

The evidence upon this point establishes, that on the 7th of July, 1836, a lease of several squares, and lots comprised in the property in contest was executed by notarial act by the defendant, Myra Clark, in favor of one T. B. Harper, for the term of two years; that said Harper *was in possession* of the property mentioned in the lease for about eighteen months, after which he was called upon by the defendant, Myra Gaines, then Mrs. Whitney, to cancel the lease. At that time, she and her husband claimed the property as theirs; and the object of the lease was, that Harper *should keep possession of the property*, or sub-lease it to others. The lot No. 5, upon which buildings were erected, was only leased for six months. On the 4th of June, 1836, a sale of a considerable part of the property described in the petition, was passed by Mr. and Mrs. Whitney to Harper, by an authentic act, in which it is expressed, that said property was delivered to the vendee *who acknowledges possession thereof*. This property was re-sold by Harper, to his former vendors on the 10th of April, 1837, by a notarial act, in which it is mentioned, that

the vendees acknowledge possession thereof. On the 22d of June, 1838, a certain suit was instituted by the defendant Myra, against F. Buisson, who, as Sheriff, had seized a large portion of the property in dispute, in which she claimed said property as her own, alleging, in her petition, that *she was in the real, and actual possession of the same, as owner*; and that, *notwithstanding her said ownership and possession*, Frederick Buisson, had seized it, &c. The evidence further shows, that one of the defendants, E. P. Gaines, said and acknowledged, that he had possession of the property, which he qualified as a conservative or provisional possession. This was said in open court, on the former trial of this suit, or of a suit between the same parties before the District Court.

With this evidence before us, how can the defendants disclaim their ever having had the property in their actual possession. This is acknowledged by them in their acts with Harper. They leased the property, or part of it, to Harper, who possessed for them, and under them. They sold the same to Harper, who acknowledged himself to be in possession thereof; and at a later period they alleged, in a judicial proceeding, as the basis of their action against Buisson, that they were, that is to say, that Myra, the principal defendant, was in the real and actual possession of the property. They cannot now gainsay their own acts and admissions; and it seems to us clear, that the plaintiffs have satisfactorily shown that some time before the institution of this suit (brought in April, 1841,) the defendant, Myra, repeatedly pretended to be, and was actually, in the possession of the property in controversy. It is true, that it has not been proved that the defendants were in the natural or corporeal possession of the property, at the time when this suit was instituted; but we are not ready to understand that the word "*actual*" used in the 43d art. of the Code of Practice, should mean strictly a natural or corporeal possession, in the sense of arts. 3391 and 3393, of the Civil Code. It may, perhaps, apply to the civil, as well as to the natural possession, provided the defendant in a petitory action, contradictorily with whom the question of title is to be settled, be really pretending to possess the property as owner; and without its being necessary to enter into any new discussion upon the different kinds of possession recognized by our

laws, we shall merely refer to the case of *Ellis v. Prevost*, 13 La. 230, and 9 La. 251, in which we held, that "in a possessory action, (in which the law requires that the plaintiffs should be in the *real and actual possession* of the thing, Code of Practice, art. 49,) the civil possession of the plaintiff, preceded by an actual and corporeal detention of the property, will suffice." So it must be in a petitory action, where the law requires that the defendant should be in the actual possession of the thing; otherwise, the same absurdity would result, if a party, whose property is claimed by another who exercises acts of possession over it not amounting to a natural possession, was not permitted to institute a petitory action, unless he is able to prove that his adversary is in the *actual*, nay, in the *corporeal possession* of the property. It seems to us, that the principles established in the case of *Ellis v. Prevost* above quoted, in relation to the kind of possession which the plaintiff should show in a possessory action, are fully applicable to the possession which the law requires the defendant should have in a petitory one. Indeed, a contrary doctrine would, in our opinion, be preposterous, as the plaintiffs in this suit, who are not in possession of the property sued for, and who cannot bring a possessory action, would be remediless under our laws, and could never sue to recover the property to which they may perhaps have a good title. The case referred to in 5 La. 356, establishes the general rule, and is not adverse to our present construction of the law.

We think, that this action comes clearly within the meaning of art. 43 of the Code of Practice; that the acts of possession shown to have been exercised by the defendants, who always claimed the property as owners, are sufficient to enable the plaintiffs to allege that they, said defendants, were in the *actual possession* of the property at the time this suit was brought; that the previous acts of natural possession on the part of the defendants, continued to have their effect subsequently, as if the property had not ceased to be actually possessed by them; and that, unless said defendants have succeeded in showing a better title than the plaintiffs, the latter must recover.

II. The defendants' answers do not contain any special denial of the plaintiffs being the heirs of Mary Clark, and of the said

Mary Clark's being the mother and instituted heir of Daniel Clark. We shall, therefore, consider that the identity of the persons who brought this action is sufficiently established; that is to say, that they are the same persons named in Mary Clark's will, and that the said Mary Clark, under whose will the plaintiffs claim, is the same person named in Daniel Clark's testament. If the defendants had intended to require proof of their identity, it was their duty to put it at issue. Now, under the will of Daniel Clark, found in the record, Mary Clark, his mother, is instituted his universal legatee. He says: "I leave and bequeath unto my mother, Mary Clark, all the estate, whether real or personal, which I may die possessed of." This will was regularly admitted to probate. Under the will of Mary Clark, which was also duly admitted to probate, and ordered to be executed in Louisiana, the plaintiffs were all instituted the universal legatees, or devisees of the estate of the deceased. She orders all her moneys and active debts to be collected, and all her property to be sold by her executors, for the purpose of the proceeds being divided, and distributed into four equal parts to the persons, thereafter named, each for one share, or fourth part thereof; and the plaintiffs are the persons named in the said will. It is clear, therefore, that the plaintiffs are entitled to act in the the right of Mary Clark, as the universal legatee of Daniel Clark, deceased. The record contains also all the title deeds to the property in dispute, as acquired by Daniel Clark, from different individuals; and it cannot be controverted, that the property described in the petition belongs to his estate, and subsequently to Mary Clark, in whose rights the plaintiffs are now claiming. We conclude, that the plaintiffs have satisfactorily made out such title to the property claimed as to enable them to recover against the defendants, who have shown no title whatever. They must be declared to be the owners of the property.

It has been intimated, though not, perhaps, insisted on, that the plaintiffs could not establish their right, and title to the property, claimed, in any other court but the Probate Court, where the estate must be settled. This is a petitory action, or an action of revendication; and it is well settled, that such actions are to be brought before the ordinary tribunals, even when instituted

against successions. Code of Practice, art. 983. But here, the defendants appear to be mere strangers to the estate of Daniel Clark ; they set up no right under him ; and it is no where shown in the pleadings, nor in the record, that they are in any manner concerned, or interested in the estate of the deceased. It is clear, that they have nothing to do before the Probate Court, in relation to the succession, and that the settlement thereof is entirely foreign to the matters at issue.

III. Without its being necessary to recite those parts of Mary Clark's will, which are said to contain clauses of substitution, it will suffice for us to say, that an attentive perusal of its terms has not enabled us to discover any such clause. The dispositions are, that in case any of the legatees *should die before the testatrix*, the share of the deceased legatee should go to his child, or children, their heirs and assigns. This clause is contained in the will with regard to two legatees. As to the third, the legacy is not subject to the same objection, and as to the fourth, who is a minor, the testatrix wishes, that her share should go to such person as she shall choose as her guardian, to be appropriated for her support and maintenance ; and, in case of the legatee's dying unmarried, that her portion should be divided between the testatrix's other heirs named in the testament. As this court said in the case of *Duplessis v. Kennedy*, 6 La. 241, such clauses "amount to nothing more than a limitation of the testatrix's own power to dispose of the legacies after their reversion to herself, (in this case there would be no reversion, since the right of the legatees never was open,) which would be wholly nugatory, and we cannot say, that this is the essential characteristic of a substitution." The case cited from 13 La. 1 to 8, is not applicable ; and, at any rate, it is evident that the death of either of the legatees before that of the testatrix, would not prevent her from disposing of her property, as she pleased, in favor of any other person. There is no obligation to keep and preserve the property ; and, even in case of her not changing her will, the right of the legatees first instituted never having accrued, the other legatees eventually substituted to them would clearly take under the will, without any reference being made to the previous institutions. Furthermore, this ground of defence is set up by persons

Hodge v. Leeds and another.

who have shown no legal interest in the succession of Mary Clark. This, perhaps, would be sufficient to preclude them from opposing it; but, even supposing that they could, it must be pronounced unavailable.

On the whole, we agree with the Judge, *a quo*, in the opinion, that the verdict is contrary to law and evidence. It must be set aside, and our judgment must be in favor of the plaintiffs.

It is, therefore, ordered and decreed, that the judgment of the District Court, be annulled and reversed; and that the plaintiffs, Caroline Barnes, wife of John Barnes, Jane Green, and Eleanor Maniff, wife of Peter Maniff, be, and they are hereby decreed, and declared to be the owners of three undivided fourth parts of the property described in their petition, to be by them recovered of the defendants, 'in the proportion of one undivided fourth part thereof to each of the said plaintiffs, respectively, and that the said defendants pay the costs in both courts.

Barton and Roselius, for the appellants.

W. Christy, for the defendants.

ANDREW HODGE v. JEDEDIAH LEEDS and another.

APPEAL from the District Court of the First District, *Buchanan*, J.

SIMON, J. This is an appeal, taken by Andrew Hodge, from a judgment on a rule taken by Leeds & Co., to dissolve an injunction.

Certain proceedings having been had, at the suit of the Union Bank of Louisiana, Commogère and others, for the seizure and sale of property, mortgaged to the said Bank, to secure and satisfy the sum of \$310 27, with interest, the same was offered for sale, by the sheriff of the parish of Jefferson, and adjudicated to Andrew Hodge, junior, for the sum of seventy thousand dollars cash. The purchaser did not comply with the conditions of the sale. In the meantime, Leeds & Co. intervened and made a third

Hodge v. Leeds and another.

opposition, by virtue of a privilege, by them claimed on the mortgaged plantation, for the sum of \$3742 24, praying that the amount secured by said privilege, might be paid out of the proceeds of the sale of said plantation, in preference to the claim of the Union Bank. Whereupon judgment was rendered, in favor of the said Leeds & Co, according to the prayer of their petition; which judgment was duly notified to the parties to this suit. A few days afterwards, Leeds & Co., on exhibiting to the court the return on the execution, showing that Andrew Hodge, Jun., to whom the plantation was adjudicated, had failed to comply with the conditions of the sale, obtained a rule on the coroner, to show cause, why he should not expose the plantation for sale anew, and adjudge it to another person; which rule was notified to Andrew Hodge. On the trial of the rule, it was shown that the purchaser, Hodge, had paid the claim of the Union Bank; but it was ordered, that said rule be made absolute, and that the plantation be exposed for sale anew, under an execution issued by Leeds & Co., and from this judgment, Andrew Hodge appealed.

During the pendency of the appeal, Leeds & Co. took a rule before the inferior court, on Andrew Hodge, the appellant, to show cause, why the order granting a suspensive appeal, should not be set aside, on the grounds set forth in the written motion by them filed; whereupon, it was ordered, that the third opponents have leave to issue an execution, upon the judgment by them obtained, notwithstanding said appeal. An execution was issued accordingly, and the coroner was about proceeding to sell again the property originally adjudicated to Hodge, when the latter obtained an injunction, to stay the proceedings of the coroner, on divers grounds alleged in his petition; among which, it is alleged that although subsequent to the judgment on the last rule, the court had granted a suspensive appeal, which was regularly filed by the appellant, yet the coroner refused to suspend his proceedings, and persisted in re-selling the plantation. Exceptions were filed by Leeds & Co., who, on the 7th of January, 1842, obtained from the court, *a qua*, a rule on Andrew Hodge to show cause, why the injunction granted should not be dissolved, with ten per cent interest, and twenty per cent damages on the amount enjoined, and two hundred dollars special damages as attorney's fees,

on the grounds : 1st. that from the showing of said Hodge, on the face of his petition, he is not entitled to the said writ of injunction :—2d. that the allegations in the said petition, are insufficient and untrue :—and 3d. that the bond given by said Hodge, is not formal nor sufficient, and that the surety to said bond is not good and solvent.

This rule was submitted to the court, without any evidence being adduced on the solvency or sufficiency of the security on the injunction bond ; and the inferior Judge was of opinion, that the rule must be made absolute, at least, for such amount, as should appear proper under the circumstances. But a question arose upon the construction of a written compromise, made between the parties after the motion was made ; and it was contended, on the part of A. Hodge, Jr., that this compromise does away with the claim of Leeds & Co., under the law of 1831, to damages upon the dissolution of the injunction. Whereupon, the judge, *a quo*, considering the matter compromised, as totally separate and distinct from Hodge's legal obligation arising out of his injunction bond, was of opinion, that the damages and interest claimed were not provided for by the compromise, and were not included therein ; and rendered judgment against said Hodge, dissolving the injunction, and condemning him and his surety, *in solido*, to pay to Leeds & Co., seven hundred dollars damages, with interest, at the rate of ten per cent per annum, on the sum of \$3500. From this judgment, Andrew Hodge, Jr. took the present appeal.

The question raised in the court below, in relation to, and in consequence of, the compromise, is renewed before us ; and it is contended by the appellant's counsel, that the compromise put an end to all previous claims of Leeds & Co. against A. Hodge, of whatever kind or nature they may have been, and limited their claims to the sums or objects mentioned in the compromise, as contained and expressed in the following receipt :

"New Orleans, 12th January, 1842. Received of Andrew Hodge, Jr., one thousand dollars, on account of my claim for the engine, &c., furnished L. & M. Commogère under his guarantee, which we have agreed to compromise for the sum of thirty-five

Hodge v. Leeds and another.

hundred dollars, besides the costs of boxing and cartage, interest, and costs of suit. **LEEDS & Co.**"

Under art. 3040 of the Civil Code, "transactions regulate only the differences, which appear clearly to be comprehended in them by the intention of the parties, whether it be explained in a general or particular manner, unless it be the necessary consequence of what is expressed; and they do not extend to differences, which the parties never intended to include in them." Now, it seems to us, that the object of the compromise, was to put an end to the litigation which existed between the parties previous thereto, and to settle all the matters in difficulty between them. This compromise was made after the motion to dissolve the injunction had been filed, and after the service of the rule had been made on the defendant, Hodge. Both parties were aware that damages and interest had been claimed by Leeds & Co., and this was, undoubtedly, one of the differences which Hodge wished and intended to settle, in order to avoid the consequences of his injunction. The compromise provides for the payment of the interest due, and of the costs of the suit. Why provide for those costs, and not for the damages, if it was not understood that those damages should be waived? The payment of the costs indicates, that no further matter existed in litigation between the parties—that their differences were at an end; and the idea that the suit was to continue, with regard to the damages, appears to us inconsistent with the implied agreement, that the suit was to be ended by the payment of the costs. Indeed, we consider the renunciation on the part of Leeds & Co., of the damages and interest by them claimed under the law of 1831, as a necessary consequence, of what is expressed in the compromise; and if it be true, as we think it is, that the parties intended to bring to a final and amicable settlement, all the matters in dispute between them, they must have had in view, that the claims of Leeds & Co. against Hodge, arising from the matters in litigation, should be limited to the sum of \$3500, the costs of boxing and cartage, interest, and the costs of suit; or, in other words, that on the payment of the sums included in the compromise, the appellees should have no

Sharkey v. Wood and another.

further claim to set up against the appellant : otherwise the object of the transaction would not be attained. Civil Code, art. 3038.

It is, therefore, ordered and decreed, that the judgment of the District Court be annulled, and reversed, so far as it condemns the appellant to pay to Leeds & Co., the sum of seven hundred dollars damages, together with ten per cent interest, per annum, on \$3500 ; that the same be affirmed as to all its other parts ; and that the appellees pay the costs of this appeal.

L. Peirce, for the appellant.

Bradford, for the defendants.

JOHN SHARKEY v. CATHARINE WOOD and another.

Where it is admitted, that an award was made without the arbitrators having been sworn, parol evidence of their proceedings is inadmissible.

Parol evidence is inadmissible to prove the cancelling of written contracts. Such evidence is inadmissible against a written contract ; and proof that it was cancelled, is the strongest evidence that can be given against it.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*

MARTIN, J. The plaintiff claims the balance of the price of a house built for the defendants. They pleaded the general issue ; and that the house was inartificially built, and not completed according to the contract ; and that they had made payments to the whole amount, to which the plaintiff was entitled ; and further, Hill denied all responsibility, having acted only as an agent. There was a verdict and judgment against them, and they appealed.

Our attention is first arrested by a bill of exceptions. The plaintiff having admitted that an award had been made without the arbitrators having been sworn, the counsel for the defendants objected to the admission of parol evidence of their proceedings, and of an abandonment of the written contract, and an agreement to pay on the *quantum valebant*. The court admitted the parol evidence, and ordered it to be taken down, adding, that on the trial, the defendants' counsel would be allowed to ask the court to charge the jury, as to the legal effect and the validity of the evi-

Sharkey v. Wood and another.

dence. The Judge informs us, "that the agreement to arbitrate was not objected to; that all other evidence, as to arbitration, was rejected; and that whether the written contract was set aside, was a matter of fact to be left to the jury." We are unable to see, on what ground the objection to parol evidence of the proceedings of the arbitrators was overruled, and on what grounds parol evidence of the cancelling of a written contract was admitted, and of the substitution thereto of a verbal agreement. The code forbids testimonial proof against an act. Proof that it was cancelled, is the strongest proof that can be given against it.

As to the defendant, Hill, there is not the least tittle of evidence from which it may be implied, that he was a party to the contract for building the house. He did not sign it, and his name is not mentioned therein. He afterwards acted as agent of his co-defendant, his sister-in-law. The plaintiff, in numerous parts of his long petition, stated this. As to him, therefore, the verdict is contrary to law and evidence. It ought to have been set aside, and was improperly made the basis of the judgment. He is, therefore, entitled to relief at our hands.

It appears to us, that the court erred, in overruling the objections of the defendants' counsel to the introduction of the parol evidence stated in the bill of exceptions.

It is therefore ordered, adjudged, and decreed, that the judgment be annulled, avoided, and reversed, and that ours be for the defendant, Hill; and in regard to the defendant, Wood, it is ordered, adjudged, and decreed, that the verdict be set aside, and the case remanded for further proceedings according to law, with directions to the court not to admit the parol evidence objected to by the defendants' counsel, the plaintiff paying the costs in both courts, as far as they relate to the defendant, Hill, and those of the appeal, as far as they relate to the defendant, Wood.

Culbertson, for the plaintiff.

T. Slidell, for the appellants.

LUCIUS HITCHCOCK v. HARVEY NORTH.

In an action for damages for a malicious prosecution, a defendant may, under the general issue, offer in mitigation of damages, evidence of circumstances calculated to show that he had just cause to suspect the plaintiff of the offence with which he was charged. All the circumstances attending the transaction tending to show the defendant's motives, ought to be inquired into.

APPEAL from the District Court of the First District, *Buchanan, J.*

BULLARD, J. The plaintiff seeks redress in this action for slanderous words uttered against him, and for false imprisonment instigated by the defendant. He represents that he was pointed out by the defendant to the policemen as a suspicious character, and ordered to be arrested. That he was conducted through the city as a common felon, his pockets searched, and that he was confined in the police jail, where he was obliged to stand up all night. That in the morning, he was put into a *cachot*, or dungeon, and there watched with other persons, among others, a negro fastened in the stocks. That he was afterwards taken before the Recorder of the First Municipality, who required bail, which the petitioner could not give, because he had no opportunity to communicate with his friends. That he was, thereupon, hand-cuffed and conveyed to prison, where he was confined from the 4th to the 15th of January, 1841, when he was brought before the Recorder and honorably discharged. He charges these acts to have been done maliciously, and without probable cause.

The petition discloses acts of high handed oppression and outrage. The plaintiff was not charged on oath with any criminal offence; he was dragged through the streets as a felon, and confined for ten days in a loathsome jail. He recovered a judgment for one thousand dollars damages, and the defendant appealed.

Our attention is called to a bill of exceptions, from which it appears, that the defendant offered to call witnesses to prove, that on the evening on which the plaintiff was arrested, the defendant had good reasons to suspect and believe that a plan had been laid, and was about to be carried into effect, that evening, to break into

and rob his store, and to connect the plaintiff with said plan and intent to break in and rob the said store, and thereby to repel the plaintiff's allegation of malice and want of just cause, and to show just cause for calling in the police, and their arrest of the plaintiff. The plaintiff's objection to such evidence was sustained by the court, and the defendant took his bill of exceptions.

Although the defendant did not make any affidavit before the Recorder, which would have authorized a criminal prosecution, and has not pleaded in justification, but relies upon the general issue, yet as the plaintiff charges him with malice, we think the evidence offered was admissible, in mitigation of damages. It appears, by a second bill of exceptions, that the defendant further offered witnesses to prove, that, at the moment of the arrest of the plaintiff, he was in company and associated with a person of bad character and conduct; and harbored and habitually associated with such person, rendering him obnoxious to suspicion himself, and thereby to rebut the inference of malice on the part of the defendant, and to show just cause for his arrest. We are of opinion the judge ought to have permitted, in mitigation of damages, the latitude of proof asked for by the defendant. It may be true, that those circumstances did not appear to the defendant sufficiently strong to authorize him to make oath to the belief of the existence of some criminal intent on the part of the plaintiff, yet all the circumstances attending the transaction, tending to show the defendant's motives, ought to have been inquired into.

It is, therefore, adjudged and decreed, that the judgment of the District Court be reversed, and that the case be remanded for a new trial, with directions to the judge not to refuse the evidence as set forth in the bills of exceptions; and that the plaintiff pay the costs of the appeal.

Cohen, for the plaintiff.

Bradford and Grymes, for the appellant.

THOMAS CLARK v. JOHN SLIDELL.

The best evidence which the nature of the case admits of, must be produced. Loose admissions, or conversations of parties, cannot supply the absence of documentary evidence, when in existence. The documents themselves must be produced, unless their loss is satisfactorily proved, or their absence clearly accounted for, and then their contents must be established.

Parol evidence of the admissions of a party, tending to contradict positive written evidence, such as the enrolment of a steamer, is inadmissible.

Extra-judicial admissions of parties, particularly those made in loose conversations, are the worst species of evidence, and entitled to little weight, unless it be impossible to procure any other.

APPEAL from the District Court of the First District, *Buchanan, J.*

Carter, for the appellant.

T. Slidell, for the defendant.

SIMON, J. The plaintiff is appellant from a judgment rejecting a claim by him set up against the defendant, for the sum of five hundred dollars, which, he alleges in his petition, was collected by the defendant as an attorney at law, out of various claims which were placed in his hands for collection, but which the defendant refuses to pay, alleging that he has claims for that sum against plaintiff, growing out of the building, and equipping of a steamboat called the *Brilliant*.

The issue presented by the defendant's answer is, that in 1837, he entrusted to the plaintiff the sum of \$500, to be by him expended in the construction of a steamboat to be called "*The Brilliant*;" in which the defendant's interest was to be in the proportion of \$500, to the whole sum which the plaintiff estimated would be necessary for the completion of said boat; that this sum was stated, in a subscription paper, circulated by the plaintiff, and in his custody; that the defendant would not have subscribed for the building of said boat, unless the whole sum necessary for its completion should be furnished by the plaintiff, or his associates; that the plaintiff failed entirely in his obligations, and that he is bound to account to the defendant for the

said sum, which he pleads in compensation of the plaintiff's demand.

The facts disclosed by the evidence are these: The plaintiff had in his hands the sum of \$500, belonging to the defendant, which was the amount of said defendant's subscription to the building of a steamboat, which the plaintiff undertook, and was charged to build. This boat cost over \$30,000, and was brought down in 1837, to run to Bayou Sara, as a packet. The whole amount due for building her was not paid by the plaintiff, and in the latter part of 1837, a suit was brought against him for a large sum of money due to, and advanced by his agents for the building of said boat. Judgment was rendered against him for upwards of \$20,000, as a privileged claim on the steamboat *Brilliant*. The boat had been enrolled in the name of the plaintiff, who thereby appeared to be the sole owner thereof. The amount of the subscription is not shown; but a witness says, it was about \$25,000, which was subscribed by several persons. The plaintiff thought proper not to produce the list, or to account for its absence, although he is shown to have had it in his possession. Some time in 1839, the defendant accounted to the plaintiff for collections which he had made for him, and retained in his hands a sum of \$500, which is stated in the receipt to be the amount delivered by the defendant for the purpose of building a steamboat, and which the defendant claimed to offset against the moneys in his hands.

On the trial of this cause, in the court below, the plaintiff attempted to examine a witness for the purpose of showing, that the defendant, who was his attorney in the suit brought by Kellogg & Co., against him, informed the witness, that he (defendant) and others were at that time stockholders in the steamboat *Brilliant*; that they were anxious to get rid, by a sale of the boat, of other stockholders who had not paid up their subscription; and that the defendant and others were anxious to purchase her in at said sale, and questions were made to the witness to that effect. The witness was also asked if, as attorney for the plaintiffs, he, said witness, did not consent to the proposition, and if the defendant, and others did not purchase the boat at the sale? All these questions

were objected to, and the court having refused to allow the witness to answer them, the plaintiff took his bill of exceptions.

The District Judge did not err. The evidence sought to be introduced, was not the best proof of the facts intended to be shown. The plaintiff should have produced the subscription list to establish, that the defendant was a stockholder, and to show the terms of the subscription; as he should have also produced the sale of the boat to prove, that it was purchased by the defendant and others. Loose admissions, or conversations of parties cannot supply the absence of documentary evidence, when it exists; the documents themselves should be produced, unless their loss is satisfactorily proved, or their absence clearly accounted for, and then their contents should be established. The admissions sought to be proved by the witness, went also to contradict the positive written evidence, that the plaintiff was the sole owner of the boat, which was enrolled in his name, and this cannot be permitted. Extra-judicial admissions of parties, particularly those made in loose conversations, are regarded as the worst kind of evidence, and should be entitled to very little weight, unless it be impossible to procure any other. When other and better evidence exists, they should not be admitted.

On the merits, we concur with the Judge, *a quo*, in the opinion, that it was the duty of the plaintiff to show, that he appropriated the money deposited with him by the defendant, to the purposes for which the deposit was made. If he acted as the defendant's agent, he ought to have shown the use of the money in the manner contemplated by the contract. It is not enough to say, that the boat was built, and that the defendant was a stockholder. It ought to be shown, that the amount of the subscription was really invested in the payment of the cost of the steamboat; and, if the amount subscribed for was not sufficient, it was easy to establish, that the debt for which the suit was brought against the boat, was contracted to supply the deficiency in the funds necessary for the completion of the boat. This the plaintiff has not only failed, but has not even attempted to do. Again, he should have produced the subscription list, as he has not shown, that it was not in his power to do so, and he should have also shown the amount of the cost of the boat. He has no right to keep the de-

Bean and others v. The Mississippi Union Bank.

defendant's money, unless he proves, that it was appropriated in the manner, and for the purposes contemplated by the persons, who entrusted the amount of the subscription to his agency.

Judgment affirmed.

HORACE BEAN and others v. THE MISSISSIPPI UNION BANK.

It is not necessary to support an attachment, that the bills of exchange on which the garnishees are liable, should be within this state, nor that the evidence of the debt should be seized. There is, in this respect, a wide difference between an attachment, and a seizure under execution. Any debt due by a resident to a non-resident, whether by note, acceptance of a bill, endorsement, or otherwise, will support an attachment. Payment by a garnishee under a judgment against him, will protect him from any demand by his non-resident creditor.

An attaching creditor can recover of the garnishee no more than his debtor, the creditor of the garnishee, could have recovered at the date of the attachment.

An exception by the garnishees, in a suit against a corporation existing in another State, filed after issue joined, that the plaintiffs did not make certain assignees or trustees of the corporation, under a deed of assignment, parties to the action, will be disregarded where it does not appear that the plaintiffs were parties to the deed, or that they, or the garnishees had notice of the assignment of the debt attached, previous to the institution of the suit, and neither the corporation, nor its assignees ask to be heard.

Where an attachment has been issued against a debt due by garnishees to a corporation existing in another State, the former cannot be discharged by paying or transacting with their creditors, after notice of the attachment. A garnishee is a kind of stake-holder. He cannot enter into the contest between the plaintiff and defendant, nor change his position towards either, after notice of the attachment. He is to render a true account, and can contest only as to the amount alleged to be due by him, contradictorily with both parties, and must pay to the party entitled thereto, the balance found to be due. Nor can he be released by a payment made by the drawers of the note on which he was indebted as endorser, if made after notice of the attachment.

Where, in an action against a Bank on its notes, plaintiffs attached a debt due to the Bank by persons who were made garnishees, the latter will be entitled to discharge their debt in notes of the Bank, only where they prove that they were in possession of them previous to the attachment. C. C. 2312.

It is not to be expected that a plaintiff can describe in his petition with great accuracy the debts, or forms of the obligations between his debtor and the garnishees in an attachment suit. He has not, in many cases, the necessary information to enable him to do so.

Bean and others v. The Mississippi Union Bank.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*
GARLAND, J. The plaintiffs sue on a number of the post notes of the Union Bank, bearing interest on their face at the rate of five per centum per annum, and they further claim fifteen per cent. per annum, as the damages imposed by the charter of the Bank, for refusing to redeem their notes in specie when presented, which refusal is shown by an endorsement on each note, made by the officers of the Bank, at the time of presentment. It is further alleged, that N. & J. Dick & Co. are indebted to the Bank in a large sum; and they are cited as garnishees, and interrogated as to their indebtedness. A citation was served on them on the 14th of January, 1842. On the 21st of the same month, they answered, denying that they were indebted to the Bank in any sum. The verity of their answers has been traversed by the plaintiffs, who undertake to prove their indebtedness.

It is shown by the testimony, that, in the month of May, 1839, two persons of the name of Denson, with one Rawlings, drew two drafts, or bills of exchange on the garnishees, payable nine months after date, for \$5000 each, in favor of H. R. W. Hill & Co., in which firm Dick & Co. were partners. In the same month, one John Hunn and others, also drew a draft on said garnishees, for \$1100, payable eight months after date. These drafts were accepted by the garnishees, discounted by the Bank for the benefit of the drawers or endorsers, and at maturity protested for non-payment. After the drafts of the Densons were protested, they went to the Cashier, or some other officer of the Bank, and made an arrangement, whereby about one-fourth of their amount was to be paid, and a renewal to be made for the balance, payable at a future period. This arrangement was never sanctioned by the Directors, nor was the full amount proposed to be paid, actually paid previous to this attachment. The arrangement, consequently, was never consummated, and the drafts were by the Bank put into the hands of their attorney, to institute suits against the drawers, which was done to the knowledge of Hill, one of the defendants, although it does not appear that the suits were ever prosecuted to judgment. The Bank does not appear to have released the garnishees, in any manner, previous to the commencement of this suit, although there is some reason to believe that

Bean and others v. The Mississippi Union Bank.

they supposed themselves discharged, as to these two drafts, in consequence of a supposed payment and renewal made by the drawers; but, in fact, neither the drawers, endorsers, acceptors, nor the Bank had changed positions, from the time of the proposed arrangement in 1840, up to the time when this suit was commenced. In November, 1842, nearly ten months after this attachment, the Densons, who were the drawers of the drafts, went to the Bank in Mississippi, made a further payment on account of them, and gave their note or notes, payable at a future period, for the balance, in which note or notes the garnishees are bound. This arrangement was made after all the parties knew of the attachment. Hill was in Jackson, where the Bank was located, when the arrangement was made, and no doubt knew that it was going on; although he told the officers of the Bank, that he would have nothing to do with it.

As to the draft drawn by Hunn, neither the Bank, the drawer, nor the garnishees did any thing with it, (so far as the record shows,) until the 25th of January, 1842, when the latter paid it to the Bank in Jackson, being four days subsequent to the denial of indebtedness being filed.

Upon these facts, and some others which will be noticed in connection with the different points in the case, a judgment of nonsuit was rendered, and the plaintiffs have appealed.

The answer of the attorney of the Bank is a general denial of all the allegations in the petition; and, as between it and the plaintiffs, it is sufficient to say, that they are clearly entitled to a judgment, if it shall appear, that the garnishees are indebted, so that the attachment shall have something to rest on. The real contest is between the plaintiff and the garnishees. The latter, at first, denied that the plaintiffs were the owners of the notes sued on, but that fact appearing satisfactorily, they now contest the right to recover of them, on the ground of the misconduct of the attorney of the Bank in Mississippi, and the fact of his being largely interested in the suit. It appears, that the plaintiffs are the holders of a large amount of Union Bank notes, which as brokers, they had purchased at a discount of about seventy per cent. One C. R. Clifton, who was the attorney of the Bank, and had in his hands the two drafts of the Densons, for the purpose of

suing the drawers, and collecting the amount, gave information to the plaintiffs, or their attorneys, of the indebtedness of the garnishees on them, and it was agreed, in consequence of the said Clifton's information, and of his being at the expense of prosecuting this suit, that he should have for his share, in the event of recovery, one-half of what may be made over the sum of thirty per cent, which the plaintiffs are first to receive. This agreement, it is contended, ought to prevent a recovery; but we are unable to see any tenable grounds upon which we can base such an opinion. It may be that the conduct of the attorney is highly exceptionable; but he is not the agent of the garnishees. The Bank does not complain of his conduct; and, if the plaintiffs choose to give him a portion of their demand for his information and services, we suppose they have a right to do so. The misconduct and interest of the attorney in Mississippi, cannot prevent the plaintiffs from recovering whatever the garnishees may justly owe the Bank; their liability is not increased, nor lessened by his misconduct. The plaintiffs have a sufficient interest in the notes to maintain an action on them, and might, if they thought proper, give away the whole amount when recovered.

It is contended by the counsel for the garnishees, that their indebtedness cannot be attached, as the bills of exchange, on which they are liable, are not in the State, and our attachment laws never contemplated the seizure of such rights. We cannot give our assent to this doctrine. If it be true, those laws would, in many cases, be inoperative. It is upon the debtors of non-residents, that the attachment laws are specially to operate; and if it were necessary to seize the evidence of the debt, there would be very few cases in which an attachment would lie. There is, in this respect, a wide difference between an attachment, and a seizure under execution. An indebtedness to a non-resident by a resident, whether by note, acceptance of a bill, endorsement, or other mode, may be brought under the operation of our attachment laws, by garnishment, at the instance of a creditor of the non-resident creditor, and no serious evil can result from it, as a judgment against, and payment by the garnishee, will protect him from any demand on the part of his non-resident creditor.

The counsel for the garnishees further contends, that the

attaching creditor has no more right against the garnishees than the Bank has ; and, that as the Bank had, in 1840, agreed with the Densons to renew the bills and release them, they are discharged. That the plaintiffs cannot recover more than the Bank could, at the date of the attachment, is very clear. If, therefore, on the 14th of January, 1842, the Bank could not have recovered on the acceptances of the garnishees, the plaintiffs cannot. But what is there to prevent such recovery ? The counsel answers—the agreement with the Densons. The evidence does not show the particulars of that agreement ; but suppose it clearly proved, it is shown, beyond all question, that it never was assented to by the Directors of the Bank, nor executed by the parties who proposed it. The Bank afterwards brought suit against the drawers of the bills in Mississippi, of which fact Hill was informed, and the full effect of the acceptance of the garnishees remained unimpaired, although they may have erroneously supposed the debts discharged. We see nothing in the record calculated to raise a doubt that, if the Bank, on the 13th of January, 1842, had sued the garnishees, it could have recovered a judgment on their acceptances.

It is further objected, that the plaintiffs have not made the proper parties to this suit, as the Bank, in the month of October, 1841, made an assignment of all its effects to assignees or trustees, for purposes in the deed mentioned ; and it is contended, that the assignees should have been made defendants. It does not appear that the plaintiffs were parties to that deed ; that they, or even the garnishees, previous to this suit, had notice of it, or of any assignment of the bills in question. The debt claimed by the plaintiffs is due from the bank, and we are not prepared to say, that it can, by its own act, evade the responsibilities it has incurred, and avoid actions by making an assignment of its effects. The Bank does not oppose any plea of the kind ; the assignees have not presented any claim, or asked to be heard ; and we do not think it competent for the garnishees to interpose such an exception, which they did not do, until a late stage of the proceedings, and after issue joined.

The next point raised is, that the attachment of the liability of the garnishees as acceptors of the bills, cannot prevent the Bank in Mississippi, from receiving payment of the bills there, they being

in its possession ; and that neither the court, nor these parties, could prevent the Densons from paying the Bank, whereby the whole obligation was discharged. This argument is certainly plausible ; and if the Densons had had no knowledge of the attachment, nor the garnishees any notice of the intended settlement, it would have great weight : but it is clearly shown, that in the spring or summer of the year 1842, the garnishees wrote to the Densons, informing them of the attachment, and requesting the drafts to be forwarded to them, (the garnishees,) as they supposed they had been taken up. When the settlement was made in November, 1842, the Densons, the Bank, and the garnishees, were all informed of the pendency of this suit ; and we have no doubt, Hill, one of the garnishees, who was in Jackson at the time, knew that the arrangement was about to be made, although he said he would have nothing to do with it. It is in fact shown, that the note or notes given in renewal, were signed by him, in the name of his firm, jointly with the Densons ; and for the amount of them, the parties are now debtors to the Bank. A considerable portion of the original debt is, in fact, still owing, and the garnishees are bound for it, not contingently, but actually. Article 2145 of the Civil Code says, that "payment made by a debtor to his creditor to the prejudice of a seizure or an attachment, is not valid with regard to the creditors seizing or attaching ; those may, according to their claims, oblige him to pay anew, and he has, in that case alone, recourse against the creditor." This provision most clearly prohibited the garnishees from settling with, and paying the Bank, and it from receiving ; and we do not think they can protect themselves, in consequence of an adjustment, partial payment, and renewal of the debt, by one of the parties to the drafts, made, if not at their instigation, at least with their consent. It would be very easy for garnishees in almost any case, to escape responsibility, if it were permitted to them, or to their co-debtors, to discharge themselves by paying or transacting with their creditor after attachment. We have, at different times, said that a garnishee is a kind of stake-holder ; that he has no right to enter into the contest between the plaintiff and defendant in the suit, nor to change his position towards either, after a notification of the attachment. He is to render a true and faithful account, and

can contest only in relation to what he is owing, contradictorily with both parties, and pay to the one entitled to receive the balance found due. 18 La. 405. *Frazier and another, &c. v. Willcox and another*, 4 Robinson, 517.

The counsel for the garnishees contends, that article 2145 of the Civil Code does not apply to this case, as it was not the garnishees who made the payment and settlement with the Bank, whereby they were discharged, but their co-debtors not cited as garnishees, who, he says, had a right to release themselves from responsibility by any legal means. We have before said, that if this had been done without any notice of the attachment, and not with the purpose of defeating it, we should hesitate before we would condemn a garnishee; but the evidence authorizes us to say, that the reverse is the fact in the case before us. The courts of this State, it is true, could not have interfered to prevent the arrangement made; but we do not doubt those in Mississippi would, if it had been shown by the garnishees, that the proposed settlement would prove prejudicial to their interests, and involve them in difficulty.

The garnishees further contend, that if the plaintiffs are entitled to recover, they have a right to pay them in the notes of the Union Bank, as they would have had a right to pay the Bank in that kind of currency; or, in other words, that the plaintiffs, in discharge of their judgment, must receive in payment the same kind of notes as those they sue on. The Judge below seems to have been of this opinion also, although the effect would be, to leave the plaintiffs in the same position they were in when they commenced this suit. Had the garnishees shown, that previous to the attachment, they had notes of the Bank to a sufficient amount to pay their debt, we are not to be understood as deciding, that they would not be entitled to their plea of compensation; but no such thing is shown. The garnishees have not exhibited, nor have they proved, that they, or their co-debtors, had one of the notes of the Bank, for any such purpose, which has not been placed to their credit. But if the notes were obtained subsequent to the attachment, we do not well see how, under article 2212 of the Civil Code, they could be pleaded in compensation. But all this is not very material to the present case, as the garnishees have

not shown any intention to avail themselves of a faculty they possessed ; and we cannot retain to them the right, when they have not shown their ability to discharge their obligation in the manner they propose. It is possible, that a plea of compensation might have been sustained, if the garnishees had had demands against the plaintiffs, or Clifton, who is admitted to be interested for a certain portion ; but that, we shall not decide at present.

After a particular examination of the whole case, we cannot see any reason for discharging the garnishees from the payment of the debt, for which they were bound to the Bank, as the acceptors of the drafts of the two Densons. They complain, that they were deceived by the officers of the Bank, in the latter part of the year 1841, as to their liability for these debts ; but it appears to us, that the garnishees deceived themselves, in relation to that matter. The evidence is, that the Cashier of the Bank called on Hill for various sums alleged to be owing by his firm, and, among them, for the two drafts in question. He stated, that the drafts had been paid, and so marked them with his pencil, on the margin of his account, and specified the manner of payment, which turned out not to be so, although it is very probable he believed so at the time, and the Cashier also. But the fact is, that the notes were in the hands of the Bank's attorney for collection, and, consequently, could not be found in the portfolio when a search was made for them.

The plaintiffs further claim, that the garnishees shall be condemned to pay them the amount of a draft for \$1100, drawn by Hunn and others, accepted by the said garnishees, discounted by the Bank, protested for non-payment at maturity, and remaining unpaid at the date of the attachment. There is no doubt as to the correctness of the foregoing facts ; but the garnishees allege, that they are not bound for this sum, as the attachment was of special debts in their hands, and not generally of all they might be owing, or possess, belonging to the Bank, wherefore they paid the amount of Hunn's draft to the Bank, after the attachment. The plaintiffs, in their petition, allege, that "there is money due" from the garnishees to the Bank, being the amount of the two drafts of the Densons, and one of Wade, Brice, and Noble, which they describe with sufficient certainty, and represent as being unpaid

Beah and others v. The Mississippi Union Bank.

and protested. They aver, that these drafts are the property of the Bank, and pray, that they may be attached and sequestered for the payment of their debt. They then pray, that the garnishees may be made parties, and be ordered to answer whether or not they accepted the *said drafts*, and if either of them has been paid; also, that they attach to their answer a true account of all their dealings with, and payments to, the *said Bank*; and finally, they pray, that the indebtedness of said garnishees may be paid over. The writ of attachment, or citation, served on the garnishees, commands them to appear, and declare on oath, what property they had belonging to the Bank, in what sum they are indebted, and to answer the interrogatories. The answer of the garnishees is very brief. They say, that they "accepted the drafts described" in the petition, all of which have been paid by the drawers; and they do not say whether or not they are indebted to the Bank, but merely, that they have had no transactions with it for many years, and then only in the sale of cotton, and the transmission of the proceeds. No statement, or account, is filed.

It cannot be expected, that a plaintiff can describe in his petition, with very great accuracy, the debts, or form of obligation, between his debtor and the garnishee in an attachment suit. He has not, in many cases, the necessary information or evidence, to enable him to do so. Much certainty in the allegations is not, therefore, to be exacted; but a garnishee, who knows what he owes, or what property he possesses, can answer fully. It appears to us, that the allegations of indebtedness by the garnishees are sufficient, and the attachment general. The garnishees, therefore, had no right to pay to the Bank the amount of the draft, drawn by Hunn and others, after they had notice of the attachment. The counsel has endeavored to show, that this draft was paid previous to the citation. His clients have not produced it, with the receipt specifying the date. The testimony of the officers of the Bank fixes the period as the 25th of January, 1842, and we see nothing in the deposition of the witness, Hardeman, to destroy their testimony. He is not very particular as to the date, when he was in the Bank, and heard the conversation between the Cashier and Hill, except as to its being in the latter part of the

Bean and others v. The Mississippi Union Bank.

year 1841. Then Hill said to the Cashier, as he, (the Cashier,) testifies, that he was not sure whether Hunn's draft had been paid or not, but that, if it were not, he would pay it. No other evidence of the time of payment is given, other than as above stated. From all the testimony, it is certain, that no payment was made at the time when Hill and the Cashier were examining the account of the garnishees with the Bank ; and none is shown at any other time than that stated. If there was any, it could have been shown, and the party, on whom the burden of proof rested, has failed to make it.

The judgment of the Commercial Court is, therefore, annulled and reversed ; and we do order, adjudge, and decree, that the plaintiffs, Horace Bean & Co., do recover of the defendant, the Union Bank of Mississippi, the sum of eight thousand three hundred and fifty dollars, with interest, at the rate of five per cent, on the sum of four thousand three hundred and fifty dollars, from the 1st day of April, 1839, until the 1st day of April, 1840, and interest at the like rate, on the sum of four thousand dollars, from the 1st day of May, 1839, until the 1st day of May, 1840 ; also, interest by way of damages, at the rate of fifteen per centum, per annum, until paid, on the following sums, part of the foregoing, to wit : on the sum of twelve hundred dollars, from the 2d day of April, 1840 ; on the sum of two hundred and fifty dollars, from the 3d day of the same month and year ; on the sum of five hundred dollars, from the 8th day of the same month and year ; on the sum of fifty dollars, from the 16th day of the same month and year ; on the like sum of fifty dollars, from the 20th day of the same month and year ; on the sum of one hundred dollars, from the 21st day of the same month and year ; on the sum of fifty dollars, from the 22d day of the same month and year ; on the sum of one hundred and fifty dollars, from the 25th day of the same month and year ; and on the sum of fifteen hundred dollars, from the 29th day of the same month and year. Likewise, on the sum of five hundred dollars, from the 3d day of May, 1840 ; on the sum of five hundred dollars, from the 4th day of the same month and year ; on the sum of fifteen hundred dollars, from the 5th day of the same month and year ; on the sum of five hundred dollars, from the 7th day of the same month and year ; on the sum of five

Bean and others v. The Mississippi Union Bank.

hundred dollars, from the 8th day of the same month and year ; on the sum of five hundred dollars, from the 9th day of the same month and year ; and on the sum of five hundred dollars, from the 23d day of the same month and year ; with costs in both courts ; which judgment aforesaid shall be satisfied out of the amount which the garnishees, N. & J. Dick & Co., are hereby found to be owing to the said Union Bank of Mississippi, to wit, the sum of nine thousand three hundred and seventeen dollars and seventy-five cents, with interest thereon, at the rate of five per centum, per annum, on the sum of eight thousand two hundred and seventeen dollars and seventy-five cents, from the 16th day of June, 1840, until paid, and the like rate of interest on the sum of eleven hundred dollars, part thereof, from the 1st day of February, in the same year, until paid, or so much thereof as shall be necessary to satisfy the demand of the plaintiffs ; for which last aforesaid sum and interest, the plaintiffs have judgment against the said garnishees, with all the costs in both courts that relate to the said garnishment.*

Elmore, W. W. King, and Eustis, for the appellants.

G. Strawbridge, for the defendants.

L. Peirce, for the garnishees.

* *L. Peirce, for the garnishees, for a re-hearing.* The court relies, in the opinion delivered by it, on art. 2145 of the Civil Code, and states, that "this provision clearly prohibits the garnishees from settling with, and paying the Bank, and it from receiving." Now, the indebtedness of the Densons, was not, and could not be attached, and they were co-debtors, and the Bank was the holder of the obligations, on which they were bound with the Dicks ; and, if one provision of *our municipal law*, is to be considered as binding on, and applying to, a citizen or corporation of a *foreign state*, by parity of reasoning, every other provision of the *same law*, in *pari materia*, must be so likewise. Art. 2145, is found under the title of "Conventional Obligations," and the division "of payment or performance in general ;" and, under the same division we find art. 2130, which says, that "an obligation may be discharged by any person concerned in it, such as a co-obligee, or a security." Now, the Densons were under no incapacity to pay, and under this art. they had a right to do so. Let us suppose A. and B. are jointly and severally bound to C., in a written obligation, and that they all reside in this state, and that D., having judgment and execution against C., levies on A., for the amount of his indebtedness to C.—can there be a doubt that B., could not pay to C., he having the evidence

of the debt in his possession, under art. 2130! and if he could, is it not the case of the Densons! Again by art. 2141, No. 1, of the same code, payment made to the holder of the obligation, if payable to bearer, or endorsed in blank, is a good payment, although the person receiving it may act with *mala fides*. Of what value is a *private* prohibition, not to pay a debt due a third person! If A. has judgment and execution against B., and informs C., who is A.'s debtor, of the facts, and that he intends to levy on him, and warns him not to pay, does this private communication, amount to a levy and a legal prohibition, to do that which at law and in conscience he is bound to do, unless the *law* itself steps in and makes the prohibition! This court has often said, that to bring a party into court, and bind him by the proceedings, actual citation, or the voluntary joining of issue upon the merits, must take place, and that, although knowledge of the whole matter may be brought home to the party, he is not bound without these requisites. 2 La. 171. 4 La. 156. 5 Mart. N. S. 499: and the law is still stricter in attachment suits. 8 Mart. N. S. 161. Consequently, no constructive, or actual notice to the Densons of the attachment, could subject them to the jurisdiction of the court; nor was the Bank in any manner bound by the attachment, beyond the amount actually attached, as due by the Dicks; for, as to third parties not before the court, the attachment, and all proceedings in the suit, were *inter alios acta*, and nothing but actual attachment of property of the Densons, citation, or voluntary joining of issue by them, in the cause, could in any manner affect them, or prevent them or the Bank, from transacting as to any debt or business between them. It was not enough that they were informed, that certain of their co-debtors were sued in another state, where they were bound in *law*, and in conscience, to discharge their just debt to a creditor holding and possessing the *sole evidence* of it. This is, surely, a sufficient answer to the reasoning of the court, on the *knowledge* of the attachment by the Densons, and must necessarily induce the court, to give that "*great weight*," to the argument, which they say they would, had there been no such notice. They will "hesitate before they condemn the garnishees," now that we show, that this notice was, by our own law and jurisprudence, unavailing. The court acknowledges, that the tribunals of this State, "could not have interfered to prevent the arrangement." But they say, they "do not doubt, those in Mississippi would, if it had been shown by the garnishees, that the proposed settlement would prove prejudicial to their interests, and involve them in difficulty." With deference to the court, I doubt the legal right of the garnishees to interfere between the Bank and its just debtors, the Densons, in the settlement of their accounts, simply because the garnishees happen to be bound with them, and more especially, when that settlement was, obviously, to the advantage of the garnishees; for we cannot perceive, even should we admit the right to interfere, that any court in *Mississippi*, would say, that the payment by the Densons, of the negotiable instrument, on which the garnishees were liable with them to the holders, and their extinguishment, could operate an injury to the garnishees. That a *common law* court would give this *supposed* relief, and entertain this interference,

Bean and others v. The Mississippi Union Bank.

it would be absurd to suppose. In an application to chancery, the question would be, where is the equity? Is it equitable to prevent a debtor from paying, and a creditor from receiving, a just debt, when the latter holds the evidence of it in his hand, simply because there is another debtor, who is liable, and because he is sued by a creditor of his creditor, in a foreign tribunal, and by a process unknown to the Mississippi law? Surely not. Had the Densons no interest in discharging the debt? I think they had. It may be, that in the Bank they found a lenient creditor, and that they may have made with it, an advantageous settlement; whereas, had they been obliged to make the settlement with the Dicks, on account of payment by them, they probably could not have settled so advantageously. It may be, that the Densons had an offset against the Bank; and, in short, there may be innumerable reasons adduced to show, that a direct settlement by them with the Bank, was most to their advantage; and it must be presumed, till the contrary is shown, that they, (the Densons,) did settle because it was most to their advantage. The equity to sustain a bill in chancery, must not be one-sided. The court will not enjoin an act, perfectly legal and equitable, about to be performed in pursuance and fulfilment of a duty, simply because of the interference of a third person, whom the very act goes to discharge from liability. Let us suppose, that pending the suit here, the Bank had prosecuted its suit against the Densons in Mississippi, to judgment, and had levied in execution; could the Dicks have enjoined it upon the plea that they were sued by attachment, by a foreign creditor of the Bank, on account of their liability on the drafts, in a foreign court? Would not the reply be, that the process of a foreign tribunal, and the action before it, could be no bar to the suit of the Bank against its just debtor; that the Bank held the evidence of the debt, and had full right to prosecute it to payment; that the debtor was no party to the suit here, and that the judgment could not affect him, nor interfere between him and his creditor, the Bank, or in any manner change their relative positions, previous to its execution. If, then, the Bank could have compelled the Densons to pay in Mississippi, by suit, and thus discharge the debt, they had clearly the right to receive, and he to pay; or compromise, or transact for its extinguishment, without suit.

The evil that will result from this judgment is, that a judgment here will protect the garnishees here—but they being accommodation acceptors of the bills, which have been, in the mean while, paid by the real debtors, the Densons, to the Mississippi Union Bank, the garnishees cannot *recover back* from the Densons.

1st. Because the Densons had a *right* to pay the Mississippi Union Bank, although there was pending an attachment against the Mississippi Bank here. This attachment did not affect their right to pay to the Bank, nor the Bank's to receive, because the Densons were not made *parties*, and were sued by the Bank, in their own State, *the Bank holding the bills*. That they knew, by private information, that there was an attachment against the

Bean and others v. The Mississippi Union Bank.

Bank, and that the indebtedness of the *Dicks* was attached, was nothing to them, and did not operate as an *injunction* not to arrange with, or pay the Bank. The notice must be a legal, and binding notice. If the court of Louisiana had cited them, and sent their citation to Mississippi, would it have limited or confined them in their action?

And now, that there is a judgment here against the Bank of Mississippi, is that binding upon the *Densons*, to make them pay the money again?

Under what pretexts will the *Dicks* be enabled to get their money back from any of the parties? Will the being obliged to pay the judgment here against the Mississippi Bank, be any plea? No: because, as cannot be too often said, the other parties on the bills cannot be prejudiced by what is done in this State.

The judgment cannot be used, for it is not a judgment in another State, against the Mississippi Bank, (5 Wend. 149;) and this court, while condemning us to pay, leaves us without recourse against the Bank or the *Densons*.

It may be, that the courts of Mississippi, will have the same opinion as this court, and think the garnishees justly condemned, which will leave us ordinary creditors of a broken corporation, but it will be all that can, by possibility, be obtained. Was the attachment law of Louisiana made with the intention to protect our own citizens? If so, the decision is, in this case, subversive of the intention; for every acceptance for accommodation, or otherwise, for every endorsement of bills for our customers in Tennessee, Mississippi, or Alabama, &c., we shall be liable here to attachments from the creditors abroad of every supposed holder; and from that moment, no matter who has paid the bills in the other States, and though they are sent to us to file in court to show, that they are extinguished, the Louisiana merchant must pay the creditor, and look for his remedy to suits in foreign States, that are as at full liberty to construe the just application of your attachment laws, as you yourselves are; and may well decide, for the protection of *their citizens*, that our courts have no jurisdiction, where the indebtedness arises from a voucher not in the hands, or within the control of the plaintiff; or that, should payment of such voucher by another party, be before judgment, and it be surrendered, that the plaintiff could at the time of judgment, have no more right against the *garnishee*, than he had against the absent defendant. It will be admitted, that should Horace Bean & Co., or any other person wish to use this judgment in the State of Mississippi, that the Mississippi Bank can plead, that no process was ever served upon them in the suit in which judgment was rendered, and that they never appeared thereto in person, or by attorney, and that this will bar a recovery. If then, this is no judgment against them, for the reasons stated, suppose the garnishees here instituted an ordinary suit against the Bank in Mississippi, to return the payment to the *Densons* by them made while there was a suit pending in another State, will not the answer be, there was no suit pending; it was a proceeding *in rem*, without even

Dimitry v. Pollock.

jurisdiction over the thing attempted to be reached, and as we were not in law *parties*, we cannot be made to return; and you are but ordinary creditors of ours holding our bank notes. Further remedy cannot be obtained. Can this be gainsaid! and are we to be left thus defenceless by our own courts!

The garnishees are considered by the court as personally parties to a proceeding, to which really there are no parties, the jurisdiction being founded exclusively on the existence of a thing within the control of the court. The thing, in this instance, is the obligation of the garnishees to pay the foreign debtor his acceptance, if no body else pay it previous to the bill's being presented to him. This is all that is attached. It is all that is prayed to be attached. Any improper or ignorant printed *formula* used by clerks—any general words used by the Sheriff's writs not specified by law, are nullities, and do not increase the garnishee's liability.

The court has refused to regard what has been done in another State, to free the garnishees from this collateral indebtedness, between parties, *none of them parties to any suit* in this State, and makes them pay an extinguished obligation to a person, neither owner nor holder, and which having been rightfully extinguished can never be recovered by them.

Finally, the court is prayed to reserve to the garnishees, the right to set off the notes of the Mississippi Bank, should execution issue against them. They have not tendered them; they do not plead compensation; nor do they allege, that they had these notes; but merely refer to the power, it is believed they had, to set off the judgment, in notes similar to those that are the cause of judgment against them. They wish to have an opportunity of testing the two principles as applicable to this case: the first, that the plaintiff in attachment cannot alter the position of the garnishees towards the defendants, and that all the rights they may have, are fully secured to them, one of which is, by the laws of Mississippi, as now by the law of this State, at all times to pay in the notes of the Bank; and the next, that this is a right that can be exercised after judgment, on foreign attachment, and is one that cannot be taken away by an attachment of their debt without possession of the bill.

Re-hearing refused.

MARIE ANNE DIMITRY V. GEORGE POLLOCK.

The written acknowledgment of the husband is not conclusive, as to third persons, of the amount of the dotal rights of the wife. The amount must be established contradictorily with them, and by conclusive proof.

The legal mortgage of the wife on the property of the husband, to secure her paraphernal rights, or for the reimbursement of her paraphernal funds paid to him, or applied to the discharge of his debts, only attaches from the date of such payment or application, or from the time when her paraphernal property was placed under his administration, or in his possession.

APPEAL from the District Court of the First District, *Buchanan, J.*

SIMON, J.* The facts of this case, are fully stated in the report of the first judgment rendered by this court, between the same parties found in 12 La. 296. This controversy originated in a rule upon the Sheriff alone, to show cause why the mortgages subsequent to that of the seizing creditors, Gasquet & Co., should not be released. This court said, that this could not be done in the absence of the subsequent mortgage creditors, and that they ought to be made parties. 6 La. 453.

In June, 1834, Gasquet & Co. took another rule on Dimitry's mortgagees, to show cause why their mortgages should not be released. This was terminated by a judgment of this court, recognizing the mortgage of Mad. Dimitry to be in full force, notwithstanding her renunciation, and ordering the rule to be discharged, but refusing to decree to her the proceeds of the sale of the property, inasmuch, as she was bound to pursue a particular order in discussing the property of her husband. 9 La. 585.

During the pendency of the second rule before this court, Miller, who, in February, 1834, had become the purchaser of the property, upon which the two parties, Gasquet & Co., and Mad. Dimitry, pretended to have their respective mortgages, paid the amount of his purchase to the seizing creditors, notwithstanding the appeal taken by the opponent, from the judgment overruling her opposition. This payment was made in consequence of Miller's not being a party to the rule, and of the appeal being considered as a devolutive one, only. In the mean time, Miller sold the property to Pollock, for the price of \$8000.

In December, 1836, the present proceedings were instituted, for the purpose of causing the property sold by Miller to Pollock, to be seized and sold, by virtue of the plaintiff's legal mortgage, and of applying the proceeds of the sale, to the satisfaction of a judgment obtained by the plaintiff, against her husband, in 1834, in which, she is decreed to be entitled to recover of her said husband, the sum of *twenty-seven thousand dollars*, as the amount of her dotal

*This case was decided on a re-hearing.

Dimitry v. Pollock.

and paraphernal rights, secured by a legal mortgage on her husband's property. Pollock called Miller in warranty, and the latter called Gasquet & Co., as his warrantors.

The defendant, Pollock, sued out an injunction, which was dissolved by the court below; but an appeal having been taken to this court, the injunction was reinstated, and the case was remanded for further proceedings, according to law, as the plaintiff *had failed to establish the amount by her claimed as her dot, by any other proof, but by the written acknowledgment of the husband, which cannot be taken as conclusive proof, as to third persons.* 12 La. 296.

The result of the second trial below, was a judgment dissolving the injunction for the sum of \$3330, with interest, and making it perpetual, for the balance of the sum claimed by the plaintiff, in the executory process. A similar judgment was rendered in Pollock's favor, against Miller, but the latter's claim against Gasquet & Co. was rejected. From this judgment, Pollock and Miller appealed.

The District Judge gave judgment in favor of the plaintiff, for \$3330, a balance due on the sum of \$7000, being of opinion, that the plaintiff had satisfactorily proved her claim against her husband, for the said sum of \$7000, only, although her judgment of separation gave her a much larger sum, and that she had received upon her judgment, three thousand six hundred and seventy dollars; and he accordingly decreed the sale of the property, for the balance.

The pleadings of all the parties defendant, (Miller, and Gasquet & Co., having adopted the defence set up by Pollock,) put in issue the renunciation by the plaintiff, of her legal mortgage, by which it is pretended that she is bound, as she never brought herself within the provisions of the act of the 27th March, 1835. It is further averred, that if the plaintiff has any prior mortgage, she can only exercise her right upon the proceeds of the sale, and not upon the property in the hands of the defendant; because, in answer to the rule above mentioned, she prayed that the proceeds might be paid over to her, in preference to the plaintiffs, Gasquet & Co., and the answer of Gasquet & Co. specially denies that

she has any general, or other mortgage, or any to be preferred to his. The other grounds of defence need not be repeated.

The view we have taken of the plaintiff's rights, as established by the evidence, brings us at once to the questions : 1st. What amount has she shown to be due to her by her husband, for her dotal and paraphernal property ? or, in other words, has the plaintiff sufficiently established, that she is entitled to recover the sum of \$27,000, decreed to her by the judgment of separation ; and, if not entitled to the whole amount, to how much is she entitled ?

2d. What is the extent of her legal mortgage on the property of her husband, and from what time did it take its effect on the property in question ?

First. The judgment which the plaintiff obtained against her husband, for the sum of \$27,000, embraces two sums: one of \$7000, acknowledged by the husband in a written act, to have been received by him on account of his wife, and as her *dot* ; and another sum of \$20,000, being the amount of a loan for which she mortgaged her own property to the Bank of Louisiana, and which, it being alleged to have been paid over to her husband, she claimed as her paraphernal funds.

With regard to the sum of \$7000, we may repeat here, that the record contains no evidence of its having been paid, except the acknowledgment of the husband. On the second trial, before the lower court, no other proof was adduced ; and we cannot conceive how the Judge, *a quo*, could allow her that amount, after what this court had said upon this point, in the judgment reported in 12 La. 296. There, this tribunal expressed the positive opinion, that "the claim of the wife, being expressly denied by the defendant, and it being alleged that she obtained her judgment by the consent of her husband, or his neglect to urge the proper pleas, the District Court ought to have required her to establish her demand contradictorily with the defendant, and by *conclusive proof*." This court also said, that "the District Court had erred in being satisfied with the *prima facie* evidence resulting from the judgment against her husband ;" and the case was remanded, to afford her the opportunity of producing the requisite proof. Here again, no further proof has been produced, and as we

have no reason to be dissatisfied with our former opinion, we think the District Judge erred in not rejecting this part of her claims.

As to the sum of \$20,000: it is true, that it is shown that she mortgaged her own property to the Bank of Louisiana, for a loan of that amount; but the evidence only establishes, that \$10,965 were actually paid over to the husband, or applied to the payment of his debts. Now, supposing that she could claim this amount from her husband, as paraphernal funds, although it is not shown that she ever reimbursed the amount of the loan to the Bank of Louisiana, out of her own funds, or that it was satisfied out of the property mortgaged, by the proceeds of the sale thereof, her legal mortgage would only attach on the property of her husband, from the time that he received her money, for the sum of \$7295, after deduction of the \$360 which she has already received.

Second. But does her legal mortgage, for the security of the said balance, bear upon the property in question? Does it attach upon it, in preference to the special mortgage of Gasquet & Co.? This question does not appear to have ever been brought to the consideration of this court. The facts upon which it is based, though clear and positive, were, we believe, overlooked by the counsel, on the first and second trials before this court, although it was noticed by the Judge, *a quo*, in his first judgment.

The mortgage to the Bank of Louisiana was executed on the 5th of December, 1832, and it was after this period that the husband received a part of the loan on the checks of his wife. Several of those checks are even dated so late as April, May, and June, 1833, and until then, the money had remained in the possession, and under the control of the wife. If the sum loaned was her paraphernal funds, it was under her administration; and it is well known, that the legal mortgage that a married woman has upon the estate of her husband to secure her paraphernal rights, only takes effect from the time that they have been placed in the possession, or under the administration of the husband, or from the day on which he received her paraphernal funds. Now, the mortgage to Zoits, subsequently transferred to Gasquet & Co., was executed and recorded on the 26th of November, 1832, which is *nine days* before the date of the mortgage to the Bank of Louisiana, and according to the evidence, *sixteen days* before the date of the first check,

Besch v. McDonough.

and nearly *seven months* before that of the last check. It is clear, therefore, that the plaintiff's mortgage could not *retroact* on property previously alienated or mortgaged; and that the special mortgage, by virtue of which the property was seized, and afterwards adjudicated to Miller, was to be satisfied in preference to the pretended legal one of the plaintiff.

Under all these considerations, we conclude, that there having remained nothing more due by Miller, on the amount of the adjudication, to discharge the mortgages subsequent to that of the suing creditor, he was legally entitled to a release of the said posterior mortgages, (Code Pract., art. 708;) that the seizure and sale of the property in the possession of the defendant, was illegally and improperly applied for; and that the injunction obtained by said defendant ought to be perpetuated.

It is, therefore, ordered and decreed, that the judgment of the District Court be annulled, and reversed; that the plaintiff's application for an order of seizure and sale of the property purchased by Miller, and by him sold to Pollock, be rejected; and that the injunction sued out by the defendant and appellant be made perpetual; the plaintiff and appellee paying the costs in both courts.

Canon, for the plaintiff.

Roselius, for the defendant, and Miller, cited in warranty.

Wharton and *Eustis*, for Gasquet & Co., warrantors.

MILES BEACH v. JOHN McDONOUGH.

Where one stands by, and sees his property sold under legal process, without making his claim known, or objecting thereto, he will be bound by the sale.

APPEAL from the Parish Court of New Orleans, *Maurian*, J.

GARLAND, J. The plaintiff claims \$1440, the value of two billiard tables, and damages, for being deprived of the use of them for nearly six months. The defendant denies his right to the tables, and avers, that they were in a certain house, which he had rented to one Wallace, against whom he had a judgment for the rent, and under which, and his privilege as landlord, they were

seized and sold ; that the plaintiff knew of the seizure, and was present at the sale, and never claimed said tables, or made objection to their being sold. The facts are, that Wallace was indebted to McDonough about \$650, for rent of the house, a part of which was sub-leased to one Philburn, who used it as a billiard room, and had the tables and fixtures in it. Philburn, in arrears for the rent to Wallace, made a sale of the tables to Beach in writing, who took possession of them, but did not remove them from the premises. About two weeks after this sale, McDonough had a provisional seizure made of all the moveables in the house, comprising the tables in question, under an order against Wallace, whom he sued for the rent. This suit was pending several months ; during all which time, Beach never intervened to claim the tables, though he well knew of the seizure. He was present when the tables were sold by the Sheriff, and never made any claim to them, or objected to the sale ; on the contrary, he told a witness that he came there to purchase the tables. There is no evidence that the tables are in the possession of McDonough, or ever were ; and it is certain, that Philburn, the sub-tenant, was owing Wallace about \$120 for rent, at the time of the sale to Beach, and that McDonough had a privilege on the property. There is no evidence of the specific sum for which the tables and fixtures were sold, or who became the purchaser ; and other property was sold at the same time. The consideration mentioned in the sale is not proved to have been paid, by any witness, except the vendor, Philburn, who says, that he is satisfied with it, but there is no evidence of any money, or other thing, being actually paid. There was a judgment against the defendant for \$133, and he has appealed.

It appears to us, that this judgment is erroneous. Under articles 2175 and 2176 of the Civil Code, there cannot be a doubt, that the defendant had a privilege on all the moveable property on the premises. Upon that belonging to the under-tenant, the privilege was limited to the amount of rent he was owing. The entire silence of Beach, during the pendency of the whole proceeding, although he knew that the billiard tables were seized, and in the possession of the Sheriff, is surprising, and wholly unaccounted for. After the seizure, he once, privately, in the night, removed

Marigny v. The Union Bank of Louisiana.

the tables from the premises; and, upon a threat of being prosecuted for so doing, brought them back, and quietly submitted to their being sold in his presence, without ever asserting a claim. Why he did not, under articles 396, 397, and 398 of the Code of Practice, make an opposition to the proceedings which led to the sale, and have the privilege limited to the amount said to be owing by the sub-tenant, is not explained. It is always a suspicious circumstance, when a party, alleging a claim to property, continues silent, when he knows it is about to be sold under legal process; and we have, on more than one occasion, decided, that if a person stands quietly by and sees his property sold, without making his claims known, or objecting thereto, he is afterwards bound by it. The silence of a party is sometimes as expressive and binding as a positive assent. Civil Code, art. 1811. 1 Story's Equity, 420.

The judgment of the Parish Court is, therefore, annulled and reversed, and ours is for the defendant, with costs in both courts.

Rousseau and Budd, for the plaintiff.

Grivot, for the appellant.

BERNARD MARIGNY v. THE UNION BANK OF LOUISIANA.

In an action against a corporation, based on alleged acts of fraud and deception, on the part of the directors, collectively and individually, evidence is admissible of the acts and declarations of individuals who were, at the time of such acts and declarations, directors, and concerned in the alleged fraud. Such acts and declarations, having been made before, and at the time of the transaction, are part of the *res gesta*. The voluntary execution of a contract, with the full knowledge of the grounds upon which it might be rescinded, amounts to a ratification of it, and involves a renunciation of the means and exceptions that might have been opposed to it.

APPEAL from the Parish Court of New Orleans, *Maurian, J.*

SIMON, J. The plaintiff represents, that on or about the month of March, 1839, Martin Gordon, Jr., being then Cashier of the Union Bank of Louisiana, acknowledged his indebtedness unto the said Bank, in a sum of \$51,500, for which he furnished his four promissory notes, dated the 18th of March, 1839, to the order of,

Marigny v. The Union Bank of Louisiana.

and endorsed by, M. Gordon, Sen., and next endorsed by the petitioner, each for the sum of \$12,875, bearing interest at the rate of seven per cent per annum, and made payable at twelve, fifteen, eighteen, and twenty-four months from date. That being in no way connected with the business and private transactions of the said Cashier, the petitioner was induced to endorse his notes by the consideration, proffered by the Bank, that the indebtedness of said M. Gordon was an honest and real one, and that the payment of the said notes would be guaranteed, by substituting in their place other notes, which were to proceed from the sale of the said Cashier's property, which was to be effected at a short time, and to be realized so as to meet the maturity of said notes. That the petitioner was also induced to give his endorsements on said notes, by the most unequivocal and repeated assurances on the part of the Bank, that said Cashier would thereby be enabled to keep his office, which he held at that time, with a salary of \$8000, which was to be applied to the redemption of the endorsements furnished by the petitioner, should it happen, that the property about to be sold would not produce a sufficient amount to cover the whole debt; and that, had it not been for those considerations, he, plaintiff, would not have endorsed the notes of M. Gordon, Jr.

The plaintiff further states, that at the time he endorsed the notes, M. Gordon, Jr., to the knowledge of the President and Directors of the Union Bank, could not effect the sales contemplated, to an amount approaching that represented by the said notes; and that, when the defendants allured him into the endorsement thereof, they knew full well the utter inability of said Gordon, Jr., to accomplish his promise, and also his absolute insolvency. He further avers, that although the said Bank exerted themselves to represent the indebtedness of their Cashier, as originating in a moral cause, or as created by a legal obligation, they did all this for the sole purpose of entrapping the petitioner into the responsibility which he assumed by his said endorsements; and that they prepared themselves to dismiss their Cashier, as soon as the securities demanded should be obtained.

The petitioner further alleges, that by the ill and wicked practices of the Bank, by the fraud committed upon him, by their connivance with Martin Gordon, Jr., to screen him from what he con-

sidered a dangerous debt, by their suggestions, to impress the plaintiff with the idea and belief, that his endorsement was a mere nominal one, to be covered by the proceeds of the sale, which they knew could not effect it, and by the proffered assurances that said Cashier should keep his office, they induced him, (the complainant,) to become endorser on the said notes; and that they have brought upon him the necessity of paying the same.

He further states, that in consequence of said necessity, thus brought upon him by the fraudulent, malicious, and wicked practices of the Union Bank, besides the amount which he has actually paid upon the notes, which, with the interest, are raised to \$63,430 55, he has suffered damages in the sum of \$50,000, and upwards; which, having accrued to him out of the manœuvres, deceit, and fraud above stated, render the Union Bank liable for the same. He prays judgment for the sum of \$63,430 55, and also for \$50,000 damages.

The defendants first pleaded the general issue, and specially denied the fraud and ill practices alleged by the plaintiff. They further aver, that at the time the endorsements were given by the plaintiff, he knew the affairs of Martin Gordon, Jr. much better than the defendants, as he, and M. Gordon, Jr. and M. Gordon, Sen. were in the habit of constantly endorsing for each other, to very large amounts. They also say, that the petitioner was one of the securities on the bond of M. Gordon, Jr., as Cashier of the Union Bank; and they pray, that judgment may be rendered in their favor; and further, that the plaintiff may be condemned to pay them \$20,000 damages, for the defamation contained in his petition.

The defendants subsequently filed a supplemental answer, in which, after a renewed denial of the fraud, they state, that the plaintiff was fully acquainted with the liabilities claimed by the Bank from Gordon, and which the latter settled by his notes and mortgage on his property; that, as a further consideration for his endorsements, the plaintiff was one of the Cashier's official sureties, for his said liabilities; that said Cashier was justly liable to them, for losses sustained by the Bank, in consequence of his mismanagement of the funds of the Bank entrusted to his charge, as Cashier, by which there was a deficiency in said funds to the

Marigny v. The Union Bank of Louisiana.

amount of the notes for which Gordon was responsible, and for which he always acknowledged his liability, and which liability the plaintiff has repeatedly admitted, with a full knowledge of all the circumstances, &c.

They further say, that in consideration of the loss of the plaintiff, and to render it as light as possible, they took from him, in discharge of his endorsements before they were due, and at his solicitation, bonds of the New Orleans Theatre Company, which were greatly depreciated; and that, if the plaintiff can rescind his transaction, as security and endorser, he could only recover back the bonds, and nothing else. They further allege, that the plaintiff required them to subrogate him to their recourse against M. Gordon, Sen., upon the notes by him endorsed, and to transfer to him their mortgage, as given by Gordon, Jr.; that said plaintiff always claimed the debt and mortgage as his own, and obtained a loan thereon from the Citizens Bank; that he appeared in the case of *M. Gordon, Jr. v. His Creditors*, and claimed, under oath, said notes and mortgage as his property, and acted throughout as a creditor, and received a large dividend on the same. Wherefore they allege, that as the plaintiff has made it impossible to return the notes and mortgage, he is not entitled to the remedy by him claimed; and that, at all events, he can only obtain that remedy on the return of the sum by him received from the insolvent estate of M. Gordon, Jr., with interest, and of the notes of said Gordon duly protested. They pray as in their original answer.

Upon all these issues the case was tried by a jury; who, after having received the written charge of the court, to which the counsel of the defendants excepted, on the ground, that the same was contrary to law, and calculated to mislead the jury, found and returned a verdict in favor of the plaintiff, for \$42,869, and for \$9,076 damages, making together a sum of \$51,945; and, after an unsuccessful attempt to obtain a new trial, the verdict was made the judgment of the court, and the defendants appealed.

Our attention is first called to a bill of exceptions found in the record, by which it appears, that the testimony of S. Hiriart, introduced by the plaintiff as a witness to prove statements of certain declarations made to him by Thomas W. Chinn, a Director of the Union Bank, on board of a steamboat, in relation to the dis

missal of M. Gordon, Jr., as Cashier of the Bank, and to the knowledge which the Directors had of the causes of the deficit, was objected to by defendants' counsel, on the ground that they were not the acts or the declarations of the defendants, or binding upon them, and that the same was hearsay testimony ; but it was admitted by the inferior court. The same bill of exceptions embraces also the same objections to the statement made by the witness, of a conversation with C. Adams, the President of the Bank ; also to the statement by G. Preval, another witness, (then a Director,) of conversation with Mr. Milligan and several Directors, as to the necessity that M. Gordon should resign his office ; and to the proof by Preval, that when the board was trying to come to a settlement with the Cashier, he was made to understand, that if the settlement was made, he would be permitted to keep his office. This last statement was objected to, on the ground, that no consideration of the settlement could be given in evidence, which was not expressed in the settlement itself, the same being in writing.

We think the Judge, *a quo*, did not err in permitting this testimony to go to the jury. The declarations offered in evidence were made by persons who were, at the time they were made, Directors of the Union Bank ; they were parties to the act complained of by the plaintiff, who, under the allegations of his petition, is clearly entitled to show, not only the acts and proceedings of the whole board of Directors, but also the general course of conduct, declarations, and even expressed intentions of each Director, in relation to the transaction which they then had in view, to secure the recovery of the amount said to have been lost accidentally by their Cashier. This action being based upon alleged acts of fraud and deception on the part of the Directors of the Bank, not only collectively, but also separately, and upon contrivances on their part to induce the plaintiff to endorse the notes which were to be given by M. Gordon, Jr., it is obvious, that it would be very difficult, if not impossible, to establish the fraud, if any did exist, if the complainant was not permitted to produce witnesses able to disclose the acts, doings, and declarations of the individuals who, as Directors, had a hand in the fraudulent means alleged to have been used to the prejudice of the plaintiff, and

Marigny v. The Union Bank of Louisiana.

by which his endorsements were procured. Those declarations may, perhaps, be considered as a part of the *res gestæ*, since they were made before, and at the time that the transaction took place. We are not prepared to say, that the evidence offered should have been rejected.

Our next inquiry is, not only into the legality of the written charge of the court to the jury, which, as we have already said, was regularly excepted to by the defendants' counsel, but also into a bill of exceptions taken to the refusal of the inferior Judge, to charge the jury as requested by said counsel; but before expressing our views upon the questions of law presented by the exceptions, it will be proper to advert to some of the facts established by the evidence, without, however, expressing any opinion upon their legal effect.

It appears by the evidence, that some time in the latter part of the year 1838, Martin Gordon, Jr., then Cashier of the Union Bank of Louisiana, forwarded to two of its branches three packages, containing together a sum of \$61,500, which, according to his statement, were sent by the post-office, into which, he says, that he put them *in person*. Those packages, to wit: one of \$15,000, sent to the branch at St. Martinsville, on the 15th of November, 1838; another of \$8000, to the same branch; and another of \$38,500, to the branch at Natchitoches, sent on the 15th of December, never reached their destinations, except a sum of \$10,000 contained in a package, which was received by the Cashier of the St. Martinsville branch. In the beginning of the year 1839, the deficit was discovered, amounting to \$51,500, and explained by the Cashier in the manner above stated. This appears to have been taken for granted by the board of Directors, as nothing shows that any information was ever taken from the post office, or any other source; or that any exertions were used to ascertain, whether the packages had ever been mailed and forwarded, and the direction, taking the Cashier's word for it, appeared to consider the deficit in their dealings with him, as the result of an accident. On the 18th of March, however, (here it is meet for us to observe, that we think it our duty to abstain from giving any statement of, or adverting in any manner, to the facts of fraud and deception attempted to be established or rebutted by

the parol evidence adduced by the parties, such matters being foreign to the present question,) the board adopted a resolution, appointing a committee of three to confer with the Cashier on the subject of the remittance of money to the branches, and to report on the cause which may have occasioned the deficit; and on the 19th, a report was made, stating that information had been taken from the Cashier, who, thinking that the different circumstances would have an effect to injure his character, and cast some doubts upon his integrity, *had offered to pay the Bank the whole amount of the loss, in notes to the order of his father, by him endorsed, and by the plaintiff*, payable in equal sums, at twelve, fifteen, eighteen, and twenty-four months, binding himself to dispose of sufficient property, to an amount equal to the sum due; the notes proceeding from the sale to be endorsed by himself, his father, and the plaintiff, and to be substituted in lieu of those already given. The committee, without expressing, as they say in their report, any positive opinion on the causes of the occurrence, recommended to the board, the propositions offered by the Cashier. Four notes of \$12,875 each, dated 18th of March, 1839, drawn by Martin Gordon, Jr., and endorsed by his father and the plaintiff, were accordingly delivered to the Bank. On the 23d of March, a resolution was adopted by the board, in consequence of a letter from M. Gordon, Jr., stating, that he had been informed by a person unconnected with the institution, that it was the intention of the direction to remove him from the office of Cashier, on account of the loss of \$51,500; in which it is resolved, "that the President be requested to inform the Cashier *that no decision of that kind has been made, or any motion to that effect been presented to the board.*" On the 9th of April following, a letter having been received by the board from M. Gordon, Jr., in which the latter tenders his resignation, the same was accepted, and the direction passed an unanimous resolution, "*that their confidence is unimpaired in the honor and integrity of Martin Gordon, Jr., and that they fully acquit him of all suspicion arising out of this transaction, calculated to attach suspicion to his integrity.*" On the 28th of June ensuing, an act of mortgage was executed by M. Gordon, Jr., in favor of the Union Bank, on certain property, to secure the payment of the notes, with the stipulation that said

Marigny v. The Union Bank of Louisiana.

property should be disposed of by a sale thereof, according to the obligor's original propositions.

On the 12th of March, 1840, the plaintiff made a proposition to the Bank, offering to settle the amount of his endorsements on the four notes of M. Gordon, Jr., by transferring to the board, bonds of the Orleans Theatre Company. On the 21st of the same month, the first of the four notes was protested. On the 29th of April ensuing, the propositions of the plaintiff, for the settlement and withdrawing of the notes, were accepted and executed, and an act of subrogation was passed in favor of the plaintiff, subrogating him to the mortgage given by Gordon on the 28th of June, 1839; and the notes were delivered to him for the bonds of the New Orleans Theatre Company. On the same day, Marigny gave the said four notes, and the subrogation in pledge to the Citizens Bank, for the loan of a sum of money; and on the 13th of May, 1841, the Union Bank took a mortgage on some of the plaintiff's property, to secure a loan of \$21,500 made to him. The evidence shows also, that the plaintiff appeared at the meeting of Gordon's creditors, to claim the amount of the four notes; and that he received subsequently, a sum of \$11,853 26, as a dividend proceeding from the insolvent estate of said Gordon.

From the issues presented by the pleadings, and from the evidence contained in the record, several questions of fact were submitted to the jury, under the application of certain principles of law, upon which they were instructed by the court. The facts of fraud, deception, or error, which were in issue between the parties, were peculiarly within the province of the jury; and their verdict, according to the well established jurisprudence of this court, if resting exclusively on their finding of those facts, would not perhaps be disturbed by us, unless clearly and manifestly erroneous. But the decision of this case depended also, upon a correct application of the law to the facts; and, as the jury could only derive their knowledge of the law from the instructions of the court, it becomes our duty to examine if, either in the charges given by the Judge, or in his refusing to charge as requested by the counsel of the parties, any error has been committed.

We have attentively examined the written charge of the inferior Judge to the jury, and have been unable to discover therein,

any thing to which any valid, or well founded exception could be made. It is, in our opinion, so far as it goes, a clear, and correct exposition of the law, under which the jury was undoubtedly enabled to come to an exact conclusion on the issues of consideration, error, and fraud, presented by the pleadings ;* and were

* The Judge of the Parish Court charged the jury :

"That an obligation without a cause, or with a false or unlawful cause, can have no effect. Civil Code, art. 1887. That the cause is illicit, when it is forbidden by law, when it is *contra bonos mores*, (contrary to moral conduct,) or to public order. Ib. art. 1889. That by the cause of a contract, is meant the consideration or motive for making it ; and a contract is said to be without a cause, whenever the party was in an error, supposing that which was his inducement to exist, when, in fact, it never existed, or had ceased to exist before the contract was made. Civil Code, art. 1890. That he who has paid through mistake, believing himself to be a debtor, may reclaim what he has paid. Ib. art. 2280. That a thing not due, is that which is paid on the supposition of an obligation which does not exist. Ib. art. 2282. That the payment from which one might have been relieved by an exception that would extinguish the debt, affords ground for claiming restitution. Ib. 2284.

"That applying the evidence to these principles, the jury will examine what was the consideration for which the notes of Gordon, endorsed and paid by the plaintiff, and the amount of which is now reclaimed, were given ; and, secondly, whether that consideration was real and lawful. That the consideration for which the notes were given, is acknowledged on both sides to have been a sum of money due by Martin Gordon, Jr., Cashier of the Union Bank, to the said Bank, for a deficiency in his cash ; and that to ascertain whether that consideration was real and lawful, and, therefore, binding on the plaintiff, the jury will have to inquire into the cause of the deficiency.

"Was it the result of an embezzlement, by Gordon, of the funds of the Bank ? Was it the result of a loss by neglect or accident ?

"That, in the first case—if the deficiency was the result of an embezzlement, by Gordon, of the funds of the Bank, and the fact was within the knowledge of the parties, and the contract was entered into for the purpose of avoiding a prosecution, the consideration would be unlawful and without effect. That, in the second case—if the deficiency was the result of neglect on the part of Gordon, or of accident, the jury will inquire what was the real cause—accident, or neglect. That, if neglect, it was a consideration which would give rise to a contract binding on Gordon, as well as on the plaintiff. That, if accident, the nature thereof may be inquired into by the jury ; and that, as no other accident has been alluded to in argument, than the loss of certain packages of bank notes, transmitted by Gordon to the branches of the Union Bank

Marigny v. The Union Bank of Louisiana.

this part of the case the only subject of our investigation, our duty should, perhaps, be limited to the inquiry, whether the jury made

in the country, the jury may inquire in what way, and by what conveyance the bank notes were transmitted—whether by the usual and ordinary one, and such as prudent men generally resort to ; whether any special mode of transmission had been fixed by the rules and orders of the Bank ; and whether, in the adoption of the mode resorted to, Gordon exercised a sound discretion ? That, in examining those circumstances, if the jury should find, that Gordon was justifiable in adopting the mode resorted to, or, in other words, that if he so acted in the transmission of the said bank notes, that the Union Bank could not have held him responsible for their loss, then the accident or loss would not form a consideration for an obligation on the part of Gordon, and, consequently, on the part of the plaintiff. That, from the above authorities and reasoning, the jury will determine whether there was, or was not, a real and lawful cause for the obligation of the plaintiff towards the defendants:

“ That the plaintiff, moreover, founds his action upon the ground, that there was error of fact on his part, and fraud on the part of the defendants. That the legal provisions, applicable to this branch of the case, are to be found in arts. 1813, 1814, 1815, 1816, 1817, 1818, 1819, 1820, 1821, 1822, 1823, 1824, 1825, 1826, 1841, and 1842 of the Civil Code.

“ That, under the above authorities, if the plaintiff, in the transaction which has given rise to this suit, contracted under the impression and belief, that there had been no malpractice on the part of M. Gordon, Jr.—that his, plaintiff's, endorsements would be withdrawn, and the notes be paid with the proceeds of Gordon's property—that Gordon would preserve his office of Cashier, so as to enable him to pay the notes endorsed by the plaintiff, and the contrary was the case, then he may be said to have contracted in error. That, if the defendants created or continued the above belief and impression, with an intention or design of obtaining the endorsement of the plaintiff, and thereby procured an unjust advantage for themselves, it was what the law qualifies as a fraud. And that, in either case, the obligation was null and void, or, at least, voidable.

“ That it follows, from what precedes, that if the jury find either, that no real and lawful consideration was given for the notes endorsed by the plaintiff, or that there was error on the part of the plaintiff, or fraud on the part of the defendants, the plaintiff was not bound to pay them ; and that, having paid them, according to the articles of the code above cited, he is entitled to recover back what he so paid.

“ That, with regard to the damages claimed by the plaintiff, if the jury should find that the defendants were not guilty of fraud or bad faith, they can allow only such damages as were contemplated, or may reasonably be supposed to have entered into the contemplation of the parties, at the time of the con-

a proper application of the law, to the facts disclosed by the evidence.

But the record contains a bill of exceptions, to the court's refusing to charge the jury as requested by the defendants' counsel. As to the refusal first complained of, we think the Judge, *a quo*, did not err; but as to the second, we are of opinion, that the jury was misinstructed, and that the law upon which the charge was refused, was clearly called for by the pleadings, and by the general state of the case.

It is necessary to state, that one of the grounds of defence, and a very important one too, urged by the defendants' counsel before us, and, as it appears, by the bill of exceptions, insisted on in the lower court, is, that even supposing, that the plaintiff's endorsements were obtained through error on his part, and fraud and deception on the part of the defendants, sufficient to vitiate, and annul his contract or obligation, he is precluded from alleging such error, and fraud, as grounds of nullity, as he voluntarily contracted, and executed his said obligation, after having acquired a full, and complete knowledge of all the facts, and circumstances which preceded, attended, and followed the discovery, and existence of the deficit, and of the causes which occasioned it. Hence, the question occurs, did the plaintiff contract with his eyes open? or rather, did he voluntarily execute his obligation, after having been made aware of all the preceding facts and circumstances, under which it was contracted? This question, merely one of fact, before being answered by the jury, requires, that they should be instructed, that "*the voluntary execution of an obligation amounts to a ratification of the contract, and involves a renunciation of the means and exceptions, that might be*

tract. That interest may probably be, in such a case, the sort of damages to be allowed.

"That if, on the contrary, the jury should find, that the defendants acted in fraud or bad faith, they are justifiable in finding, not only such damages as were, or might have been foreseen at the time of making the contract, but also such as they shall consider to have been the immediate and direct consequence of the breach of the contract."

Marigny v. The Union Bank of Louisiana.

opposed to it." This is the purport of the 3d paragraph of the art. 2252, of the Civil Code; and on this point, the defendants' counsel having requested the court to charge the jury according to said article, and to instruct them, "that if Bernard Marigny, entered into an obligation to the Bank in error, but voluntarily executed it, after a full knowledge of all the circumstances connected with the transaction, he could not then rescind it." The Judge, *a quo*, refused to give the charge required, read the art. 2252, to the jury, and charged them, that it had no application to the case before them. In this, we think, he erred.

The 2252d art. of our Civil Code, was borrowed from the Napoleon Code, and corresponds *verbatim* to art. 1338, of the latter. Toullier, upon this article, repulses the idea, that the voluntary execution of an obligation based upon a false cause, should not be considered as a renunciation of the means of obtaining its nullity; and he says, it is certain, and gives it as his opinion, that "*l'exécution volontaire de l'obligation sans cause, laquelle n'est autre chose qu'une ratification tacite, est une renonciation à opposer le vice de cette convention, pourvu que la fausseté de la cause fût connue au moment de l'exécution volontaire.*" Vol. 6. No. 180. Duranton, Vol. 13, Nos. 177, 280, 281, 282. Merlin, *verbo* Lesion, § 6, says: "*La nullité d'un acte, lorsqu'elle n'est pas absolue et d'ordre public, se couvre par l'exécution volontaire, que donne à cet acte, une partie qui, le connaissant, est à portée d'en faire prononcer l'annulation.*" See also, *verbo* Ratification, No. 9. Toullier, again, Vol. 8, Nos. 506, 507, says: "*Ainsi l'exécution volontaire d'un contrat, le lendemain du jour où la violence a cessé, le lendemain du jour où l'erreur, ou le dol ont été découverts, emporte la renonciation aux moyens et exceptions que l'on pouvait opposer contre cette obligation.*" As to the proof of knowledge, we are ready to adopt Merlin's opinion, *loco citato*, *verbo* Ratification, who holds, that in order to show, that a contract has been ratified by its voluntary execution, it is necessary, that the obligee should prove, that the obligor had, when he executed it, full knowledge of the defect, for which it could be annulled. "*Autrement*" says he, "*et à défaut de cette preuve, elle (la partie obligée) est censée ne l'exécuter que parce qu'elle en ignore le vice.*" These principles of law are very clear, and are

Marigny v. The Union Bank of Louisiana.

perfectly concordant with the spirit, and even letter of our own laws ; and it seems to us, that under the pleadings and evidence of this case, the art. 2252, of the Civil Code, was applicable ; that is to say, that on the position taken by the defendants' counsel, that the plaintiff had ratified the obligation by him contracted, by voluntarily executing it, after having acquired a full knowledge of the grounds upon which it could be rescinded, it was the duty of the Judge, *a quo*, to instruct the jury, that if under the evidence they were of opinion, that the plaintiff had contracted the obligation under consideration, in error, or through fraud, and deception on the part of the defendants, but that when he executed it by a voluntary payment, he had a full knowledge of all the circumstances connected with the transaction, this should be considered by them as a ratification sufficient to prevent its being rescinded, and as a renunciation of the means, and exceptions which he might have opposed to the recovery of the money by the defendants ; and that if so, the plaintiff cannot recover it back.

With this view of this part of the inferior Judge's charge to the jury, we deem it unnecessary to examine any other branch of the case on its merits, as it must be remanded to the lower court, to be tried *de novo*.

It is, therefore, ordered and decreed, that the judgment of the Parish Court be annulled, and reversed, the verdict set aside, and that this cause be remanded to the court below for a new trial, with instructions to the Judge to charge the jury, in addition to the charges left undisturbed, according to the legal principles set forth, and recognized in this opinion. The costs of this appeal to be borne by the plaintiff and appellee.

Soulé and Roselius, for the plaintiff.

H. R. Denis, for the appellants.

Nicholson and another v. Thompson and another.

JAMES NICHOLSON and another v. WILLIAM T. THOMPSON and another, Wardens of the Port of New Orleans.

Under the act of the Legislative Council of the 31st of March, 1805, which created the offices of Master and Wardens of the Port of New Orleans, the tenure of those offices was at the will of the executive. That act conferred the power of appointment on the Governor alone, to be exercised as often as he should think necessary, and he alone was to be the judge of that necessity. The incumbent might be superseded, at any time, by a new appointment emanating from the Governor. The Legislature never having obeyed the injunction of section 6, article 8, of the Constitution, by determining the duration of the offices of Master and Wardens of the Port of New Orleans, the act of 1805 has continued in force, under section 4 of the schedule appended to the Constitution. The power conferred on the Governor by the act of 1805, of making new appointments to those offices whenever he shall deem it necessary, is not inconsistent with the provision of section 8, article 6, of the Constitution, authorizing the removal of public officers by an address of two-thirds of both houses of the Legislature. Both powers may be exercised concurrently. The Constitution has not repealed the act of 1805; it has only modified it so far as to require the concurrence of the Senate in making new appointments, and in superseding the incumbents. The question of the necessity of such appointments, is not one which the judiciary can assume to decide.

Under the Constitution of this State, the Governor and Senate have no authority to remove an incumbent, where the duration of the office has been determined by law whether for a term of years, or during good behavior.

The Governor has no right to remove an officer during the recess of the Senate. He alone can, in no case, create a vacancy. Nor can he make any appointment to office, without the advice and consent of the Senate, except where a vacancy has occurred during the recess, and then only until the end of the next session of that body.

The rules which govern in the construction of a statute, are applicable to the Constitution, when supposed to conflict with an act of ordinary legislation.

The judicial department does not pretend to the power of supervising the proceedings or acts, of the other co-ordinate branches of the government; it decides only on the rights of parties in controversies which have assumed a judicial form. When the right of a citizen to enjoy the emoluments of a particular office, is contested by another pretending to have a better right under the Constitution and laws, it necessarily appertains to the judiciary to decide between them, according to the supreme law.

Neither the Governor of this State, nor the Governor and Senate, have any right of removal, as incidental to their power of appointment to office.

APPEAL from the District Court of the First District, Buchanan, J.

BULLARD, J. The question which this case presents is, whe-

Nicholson and another v. Thompson and another.

ther the office of Master and Wardens of the Port of New Orleans, be determinable at the will of the Governor and Senate, or whether the incumbents can be removed only by an address of two-thirds of both Houses of the General Assembly, or by impeachment.

The office was created by the act of the Legislative Council of 1805. At that time, the Governor of Louisiana derived his authority from Congress, and that authority was little inferior to that of a Governor-General of a Spanish Province. He appointed to office without control, and without being obliged to take the advice of any one. The act creating the office, declares, that "It shall be lawful for the Governor of this Territory to appoint, as often as *shall be necessary*, one fit and proper person to be Master, and three other fit and proper persons, to be Wardens of the said Port of New Orleans," &c.

It cannot well be doubted, I think, that this act conferred on the Governor alone the power of appointment, as often as he should think necessary; and that he alone, was the judge of that necessity, previously to the establishment of the State Constitution. The original tenure of the office was, therefore, in my opinion, at the will of the executive. The incumbent might be superseded at any time, by a new appointment emanating from the Governor of the Territory. It appears to me equally clear, that the Senate must now, under the Constitution, concur with the Governor in the act of appointment, and consequently the concurrent opinions of the Governor and Senate, are to decide upon the question of necessity. That is clearly not a judicial question. It is a question which the judiciary can no more assume the right to decide, than the Governor and Senate would have to review a judgment rendered by this tribunal.

The act of the Legislative Council creating the office in question was, in common with other acts of the Territorial Government, maintained in force by the Constitution, except so far as they were inconsistent therewith. See Schedule, sect. 4. And this leads us to the inquiry, how far the act of 1805 is repugnant to the Constitution, and how far the tenure of the office, as originally constituted, is modified by the Constitution. The clause which it is contended has taken away the powers from the executive to make

Nicholson and another v. Thompson and another.

a new appointment at will, or, in other words, to remove the incumbents, is art. vi., sec. 8. It is in the following words: "The Legislature shall determine the time of duration of the several public offices, when such time shall not have been fixed by this Constitution; and all civil officers, except the Governor, and Judges of the Superior and Inferior Courts, shall be removable by an address of two-thirds of the members of both Houses, except those, the removal of whom, has been otherwise provided for by this Constitution."

It must be premised that, in relation to the office of Port Warden, the Legislature has never obeyed this injunction of the Constitution, by determining its duration, either for a term of years, or during good behavior. If it had done so, I have no doubt the Governor and Senate would have been without authority to remove the incumbent. Such a limitation of time would have been clearly inconsistent with, and repugnant to the act of 1805, which authorized a new appointment at the will of the executive, and would consequently have repealed it. An office limited by law, could not be determined by the mere will of the executive. The practice is certainly different under the Federal Constitution, but it is remarkable, that that instrument contains no provision on the subject of removal. The people of Louisiana have thought proper to separate the appointing from the removing power, except in reference to those offices which existed previously to the Constitution, and which have not since been limited by law. I therefore subscribe, in the fullest extent, to the doctrine that, under the Constitution of Louisiana, the Governor is without authority to remove an incumbent from office, whenever the duration of that office has been fixed and determined by law, whatever may be its duration, whether for a term of years, or during good behavior. But the question relative to the right of superseding the acting Port Wardens, by making a new appointment, by and with the advice and consent of the Senate, resolves itself, in my judgment, into this—is the act of 1805, declaring that office to be at the will of the executive, repugnant to that clause in the Constitution, which authorizes the removal of public officers by an address of two-thirds of both Houses.

The same rules, I apprehend, which govern in the construction
 Vol. V. 47

of statutes, are applicable to the Constitution, when supposed to conflict with an act of ordinary legislation. The only difference between the two, is, the superior paramount authority of the former. In comparing the act of 1805 with the Constitution, in order to test their consistency or repugnancy, I would adopt precisely the same rule, as if, by a new act of the Legislative Council, instead of a Constitutional provision, it had been provided, that thereafter all officers, except the Governor and the Judges, should be removable by an address of two-thirds of the Council. If in that case, the authority of the Governor, conferred by the original act, to make a new appointment whenever he should deem it necessary, might well co-exist with the right also to remove, vested in the Council, then there is no inconsistency—no repugnancy; both powers may be exercised concurrently, and the original act is not tacitly repealed by the second, in consequence of any repugnance between them. The one does not necessarily exclude the other. The Governor may not think a new appointment necessary, and may desist from acting. The Legislature may think otherwise, and by a vote of two-thirds, even when the term of office has been limited by law, may require the removal, and render a new appointment necessary. I do not mean to say that the Governor and Senate may remove an officer, and make a new appointment, when the office has been limited by law. On the contrary, I am of opinion that they cannot. But I think, in relation to an office originally within the discretion of the executive, and the duration of which, has not since been expressly limited by law, the power to create a vacancy by removal, exists at the same time in the Governor and Senate, and in the General Assembly, under the 8th sect. of the 6th art. of the Constitution. That the exercise of that power by either is not incompatible, or, in other words, that the Constitution has not repealed the act of 1805, but has only modified it, by requiring the concurrence of the Senate when a new appointment is thought necessary.

I do not mean to be understood, as saying that the Governor has, in any case, the right to remove, in the recess of the Senate. On the contrary, I believe we all agree that he has no such power under the Constitution. That he alone, cannot, in any case, create a vacancy; nor can he make any original appointment, without

Nicholson and another v. Thompson and another.

the advice and consent of the Senate. Fortunately, the people of Louisiana have guarded against arbitrary removals from office; and the chief executive magistrate cannot, alone, create any vacancy, nor appoint to office, without consulting the Senate, except when a vacancy may have occurred during the recess, and then only until the end of the next session.

But it is argued, that the Constitution having declared all civil officers, with certain exceptions, removable by an address of two-thirds of both Houses, it is *inconsistent* therewith, that they should be removable by any other authority. But we must give some effect to the last section, *which excepts those whose removal has been otherwise provided for by this Constitution*. I will not go so far as to say, that the act of 1805, which provides for a new appointment when thought necessary, having been kept in force by the Constitution so far as not repugnant to that instrument, another mode of removal has been provided by the Constitution for the Port Wardens, by maintaining in force that act, and making it, as it were, a part of the Constitution itself; yet I am satisfied, that although in relation to offices to be created under the Constitution, the mode of removal by address or impeachment may be the exclusive one, still the original tenure of the office of Port Warden, remains unchanged, except as to the co-operation of the Senate in making a new appointment and superseding the incumbents. The word *inconsistent*, is not essentially different from *repugnant*, or *incompatible*. There may be different modes not inconsistent with each other, but concurrent and cumulative, there being no words of exclusion; and public officers may well be removable, that is, be liable to be removed, in more ways than one, without any inconsistency that I can perceive. At the same time I admit, that if the Legislature had determined the duration of the office in question, according to the injunction in the Constitution, it would have been placed beyond the reach of the appointing power.

The question of jurisdiction is, I think, easily disposed of. The judicial department does not pretend to have the power of supervision over the proceedings or acts of the other co-ordinate branches of the government. It decides only upon the rights of parties, in controversies which have assumed a judicial form.

Nicholson and another v. Thompson and another.

When the right of a citizen to enjoy the emoluments of a particular office, is contested by another, pretending to have a better right under the Constitution and laws, it appertains, necessarily, to the courts, to decide between them, according to the supreme law of the land. If in doing so, they give effect to the Constitution, in preference to an act of the Legislature, as being repugnant thereto, under that clause of our Constitution which we have sworn to support, and which teaches us, in express terms, that "all laws contrary to this Constitution shall be null and void," (art. 6, sec. 25,) or pronounce upon an act of the executive as unwarranted by the supreme law; we do no more than is required of us as an independent and co-ordinate department of the government.

Upon the whole, I conclude, that the office of Master and Wardens of the Port, is still at the will of the Governor and Senate, subject, however, to the power of removal by address; that consequently, the defendants have been constitutionally and legally appointed; and that the judgment ought to be reversed, and the injunction dissolved.

MORPHY, J. I concur in the views expressed by Judge Bullard, on the question before us, and do not know that I can make them stronger by any additional remarks; but I wish it to be distinctly understood that the majority of this court, in sustaining the appointments which gave rise to this controversy, do not do it on the ground assumed in the argument, that there is in the executive of this State a right of removal, which is incidental to his power of appointment. We hold, on the contrary, I believe unanimously, that the Governor alone, or the Governor and Senate, have no such power. It is clear, that the framers of our Constitution had in view the doctrine which had obtained under the Federal Government, that the power of removal belonged to the President alone, as an incident to his power of appointment, when they made it the duty of the Legislature to determine the duration of the several public officers, and prescribed a specific mode of removal for all civil officers: 8th sec. of art. 6 of the Constitution. Had the Legislature complied with this injunction of the Constitution and fixed the duration of these offices, the present difficulty could not have arisen. Their failure to do so presents, in my opinion, the question, not whether the Governor had the right of removing the

Nicholson and another v. Thompson and another.

plaintiffs, but whether he had that of making new appointments. It can hardly be questioned, that by the terms of the law of 1805, the Governor had the right of renewing his appointments whenever he deemed it necessary. If such was the original tenure of the office, has it been changed by the Constitution, or by any subsequent law? The only modification I can perceive, relates, not to the tenure of the office, but to the manner of making these appointments, which, like all others, must now be made by and with the advice and consent of the Senate. B. & C.'s Dig. p. 14. 9th section of article 11 of the Constitution. The concurrence of these two authorities being required to make new appointments to these offices, none, I apprehend, can be made during the recess of the Legislature, except when vacancies occur, as provided for by the 10th section of the 3d article of the Constitution. The Governor and the Senate then have, in my opinion, the right of making new appointments whenever they think it expedient, and will continue to have, and enjoy such right, until the tenure of the office is changed. When they exercise this right of appointment, the former incumbents, to be sure, go out of office, but this happens not by a removal of the Governor and Senate, but in consequence of the new appointments; their commission expires in the manner provided for by the law of 1805, which has been kept in force by the Constitution itself, and which provides, that "all laws now in force in this Territory, not inconsistent with this Constitution, shall continue and remain in full effect, until repealed by the Legislature." 4th section of the Schedule. I can see no inconsistency between that law and any article of the Constitution. The 8th section of the 6th article of that instrument, to which it is supposed to be repugnant, treats of the manner of removing from office, all civil officers; while the law of 1805 provides for the manner of appointing the Master and Port Wardens of the Port of New Orleans. The duration of these offices not having been determined, they are not necessarily to be held during the lifetime of the incumbents; but, according to the original tenure, they are to remain in office until superseded by new appointments, or until removed, like any other civil officer of the State, in one of the modes pointed out by the Constitution. It is true, that the singular anomaly is presented, that although the Governor and Senate

Nicholson and another v. Thompson and another.

are without the power to remove the incumbents, it is lawful for them to do an act, which, in its consequences, brings about the same result. It is, nevertheless, an appointment, not a removal, because the removal is only a consequence of the act of appointment. The Governor alone, or the Governor and Senate, would have vainly attempted to remove the Master and Wardens of the Port of New Orleans, without making new appointments, because the power of removal does not reside in them. But their power of appointment, under the law of 1805, is not the less legal and constitutional, because it may have for its consequence the removal of the former incumbents. It may sometimes happen, that in performing an act perfectly constitutional in itself, an object may be accomplished indirectly, which could not be constitutionally done in a direct manner. Thus, although Judges cannot be removed except by impeachment, or on the address of three-fourths of each house of the General Assembly, the courts over which they preside, may be abolished by the Governor and a bare majority of the two houses. This act of legislation, which the defects of an existing system may have imperiously called for, would produce, as a necessary consequence, the removal of the incumbents; and yet, it could not, I apprehend, on that account be pronounced unconstitutional. Of this, we have had an instance in our own State. In 1825, it was thought conducive to a proper administration of justice within the limits of New Orleans, to establish a City Court, composed of one Presiding Judge and of four Associate Judges, instead of the Justices of the Peace, who were then in commission. A law was passed, repealing the acts creating those inferior tribunals, and thus the incumbents were displaced, in consequence of an act constitutional in itself. B. & C.'s Dig. p. 213. I therefore conclude, that the appointments by the Governor and Senate, have been legally and constitutionally made, and that they have put an end to the commissions of the former incumbents.

SIMON, J. I have attentively examined the opinion prepared by Judge Bullard. It meets fully my views upon the important question therein investigated, and is the exact expression of the ideas which have lead me to the same conclusion.

I think that the power given to the Governor by the territorial

Nicholson and another v. Thompson and another.

law of 1805, to appoint the officers therein denominated, as often as shall be necessary is not contrary to, or inconsistent with, any of the provisions of the Constitution of the State; that such power, which cannot now be exercised without the advice and consent of the Senate, is not an infringement of the Constitution; and that the offices created by the territorial law, being not to be holden *during good behavior*, or *for life*, may be considered, under our Constitution, as being limited to the time which the Governor and the Senate may think necessary to fix, by re-appointing new officers to supersede the former incumbents.

I deem it, therefore, sufficient to state, that I concur fully with the opinion read by my colleague, Judge Bullard, which is the opinion of the majority of the members of this court.

MARTIN, J. I concur in the opinion just delivered by Judge Bullard. It is, therefore, ordered and decreed, that the judgment of the District Court be reversed, and the injunction dissolved, with costs in both courts.

GARLAND, J., *dissenting*. The plaintiffs allege that they have been legally appointed by the Governor and Senate of the State, Wardens of the port of New Orleans. That in pursuance of said appointments, they have taken the oath of office, and have, for several years past, discharged all the duties according to law. That their term of office is during good behavior; and that they have a vested right in the offices they hold, and cannot be deprived thereof, except in the mode specified by the Constitution, and laws of the State. They allege, that their said office is one of trust and profit, and that the fees thereof amount to a large sum, which belongs to them, and that they are entitled to receive the same. They proceed to state, that the defendants have set up a claim to the office, and pretend, that they have been appointed to replace and supersede them, (the petitioners,) as Wardens of the port of New Orleans, and aver, that the defendants hold said office under color of a commission lately issued by the Governor of the State. It is further alleged, that the pretensions of the defendants to hold said office, are destitute of foundation in law, and that the issuing of commissions to the defendants, by the Governor, is an arbitrary assumption of power, and in violation of the Constitution of the State, of the laws, and of the vested rights

Nicholson and another v. Thompson and another.

of the petitioners. That the usurpation of said office by the defendants, occasions great injury and damage to the petitioners. They further aver, that Thompson, one of the defendants, pretends to act in an official capacity, and has received fees from different persons, without authority, to which petitioners are entitled in law. They allege, that, without the interference of the court, the injury and damage will be irreparable.

The petitioners pray, that the defendants may be enjoined from attempting to exercise or perform any of the duties of said office, or from receiving any of the fees derived therefrom; that judgment may be rendered declaring that the defendants are not Port Wardens of the city of New Orleans; that their commissions may be declared null and void; and that they be condemned to pay damages to the amount of five hundred dollars.

An injunction was issued provisionally. The defendant Laurent answered, that it was true he had been appointed by the Governor, with the advice of the Senate, a Port Warden, but alleged that he never applied for the office, and that he has not accepted the same. He denies having ever exercised the functions of the office, or having received any of the emoluments thereto appertaining; avers that he has, on the contrary, notified the Governor that he could not accept the same. He, therefore, prays to be dismissed with his costs, as he has no claims or pretensions to the said office, or to any of the emoluments thereof.

The defendant Thompson answered, that the plaintiffs have no cause of action, and are not entitled to the remedy demanded. He further avers, that he has been regularly and constitutionally appointed one of the Port Wardens of the city of New Orleans, the effect of which appointment has been to supersede the commissions held by the petitioners, and that their functions have ceased. He denies generally the allegations in the petition, and asks to be dismissed with costs.

The facts are, that one of the plaintiffs was appointed a Port Warden in 1835, and the other in 1838, and commissions issued in conformity to the Constitution and laws of the State. Some short time past, the Governor of the State, without any complaint being made, so far as is known, as to the official conduct of the plaintiffs, nominated the defendants to the Senate as Port Ward-

Nicholson and another v. Thompson and another.

ens, and the nominations were confirmed; whereupon, commissions were issued in the usual form. The commissions are in the same words as those of the plaintiffs, with the exception of the names and dates. Thompson attempted to exercise the functions of the office, when the injunction was issued.

The law under which the appointments were made was passed on the 31st of March, 1805, (2 Martin's Digest, 396-7, § 7. Bullard & Curry's Digest, 466, No. 10,) by the Legislative Council of the Territory of Orleans, and approved by the Governor. It is as follows: "It shall be lawful for the Governor of this Territory to appoint, as often as shall be necessary, one fit and proper person to be master, and three other fit and proper persons to be wardens of the said port of New Orleans, who shall be called the Master and Wardens of the Port of New Orleans." &c. The French text is: "Le Gouverneur de ce territoire est autorisé à nommer, toutes les fois qu'il le jugera nécessaire, une personne propre et convenable pour être Maître, et trois autres personnes également convenables, pour être Gardiens dudit port de la Nouvelle Orléans, &c."

In the month of January, 1812, the Constitution of the State was adopted, and some months after, the Territory became a State. The 11th section of the 4th article of the Constitution provides, that "the existing laws in this Territory, when this Constitution goes into effect, shall continue to be in force until altered or abolished by the Legislature;" and the 4th section of the schedule, declares, that "all laws now in force in this Territory, not inconsistent with this Constitution, shall continue and remain in full effect until repealed by the Legislature." The 8th section of the 6th article of the Constitution further provides: "That the Legislature shall determine the time of duration of the several public offices, when such time shall not have been fixed by this Constitution, and all civil officers, except the Governor and Judges of the superior and inferior courts, shall be removable by an address of two-thirds of the members of both houses, except those the removal of whom has been otherwise provided for by this Constitution."

Under the law and the provisions of the Constitution just stated, the District Judge decided that the provision in the statute,

Nicholson and another v. Thompson and another.

which declared that the Governor can appoint a Port Warden whenever he shall judge it necessary, was inconsistent with the 8th section of the 6th article of the Constitution, and had no effect; and, therefore, that the Governor has no power to remove any officer except upon an address of two-thirds of the Legislature. The Judge perpetuated the injunction against Thompson, and he has appealed.

Various questions have been discussed in this court, which seem to me not necessary to a proper decision of the case, but in several of which, I concur with the majority of the court. I shall, therefore, merely state them, relying upon the arguments made in their support by my colleagues.

The first is, that the plaintiffs have no cause of action, and are not entitled to the remedy demanded. I think the action was well brought; and that an injunction is a remedy by which the injured party may have relief, or be protected in his rights. Although, technically speaking, a man may have no right of property in an office, yet he has as much right to the fees and compensation arising from it, when he is legally the officer, as he has to any other compensation he may earn by his physical or mental efforts. No one has a right to disturb or molest him in the exercise of his legal functions, or the receipt of his legal fees; and if it is done by any one without legal cause, the law will afford as ample protection and redress, as it will for the infringement of any other right. If any one disturb a public officer in the exercise of his legal authority, whereby he is damaged, he has a right of action against the wrong-doer; and he has also the same right, if any one, without legal authority, ejects him from office. 5 Mart. 271. 11 Mass. Rep. 160. 3 Tenn. Rep. 575. 1 Shower, 516. 9 Bingham, 692.

In relation to the question of jurisdiction which was argued in this court, it would, perhaps, be sufficient to say that it was not raised by the pleadings, and seems not to have been acted on in the inferior court: but I have no hesitation in expressing the opinion, that the court has ample jurisdiction. The counsel for the defence has argued this case upon the assumption, that the division of power mentioned in the 1st article of the Constitution, releases the Governor from all judicial restraint, and that his acts,

Nicholson and another v. Thompson and another.

whether legal or illegal, cannot be inquired into, or the consequences of them remedied by any action whatever. The great purpose of that article was, to create three departments for the administration of the government, one to make the laws, another to expound them, and a third to see them faithfully executed; and when it is said, that one of those departments shall not exercise any power properly belonging to the other, it must be understood in a sense that will enable each department to exercise its peculiar duties, and all, together, effect the great purposes for which the government was created. The officers of the judicial department have no right to make a law, or appoint a Judge; but if the Legislature pass an act in violation of the Constitution, or the Governor violate it, or any law constitutionally enacted, the judicial tribunals, as the expounders of the Constitution and laws, have the power, when the rights of a citizen are affected by such unconstitutional action, to declare it, and apply a remedy. The Governor has no more authority to violate the rights of a public officer, than those of a private citizen; the law guards the privileges of one, as sacredly as it does the rights of the other; and it is the duty, and within the authority of this tribunal, to see all alike protected.

The discussion at the bar has taken a very wide range; and the opinion expressed by the Congress of 1789, in relation to the power of appointment and removal of public officers, has been much relied on by the counsel for the defence. It may be true, that under the Constitution of the United States, the power of removal is incidental to the power of appointment; but it is not, in my judgment, necessary to express any opinion as to the correctness of the doctrine settled in 1789 by Congress, as this case must be decided according to the provisions of our own Constitution, which is, in my opinion, conclusive on the subject. By prescribing a mode by which all public officers shall be removable, it excludes the idea of the power of removal being incidental to the power of appointment. Under the Constitution of the United States, it seems to be agreed by all parties, if the President, with the assent of the Senate, appoint any person to an office not judicial, already filled by another, it has the effect of at once removing the latter from office; but I do not consider this to be the case in Louisiana. Our Constitution has provided the means by

Nicholson and another v. Thompson and another.

which all public officers are to be removed from office. The Governor and Judges of the courts by impeachment; or the latter, by an address of both branches of the Legislature. Clerks of courts are removable by a judgment of this tribunal; and all other civil officers by impeachment, or by an address of two-thirds of the members of both branches of the Legislature. Constitution, art. 4, § 5, 10; art. 5, § 3; art. 6, § 8. It has been said, that all public officers, whose term of office is not fixed by some law, hold their offices at the will of the Governor, or of the Governor and Senate. I do not think so. Such officers, in my opinion, hold their offices at the will of the Legislature; and neither the Governor and Senate conjointly, nor either of them, can displace them, without the assent of two-thirds of both branches of the Legislature. This is the clear intent and meaning of the eighth section of the sixth article of the Constitution.

When the Constitution fixes a rule of action, or directs the mode in which a certain thing is to be done, I do not believe the Legislature has the power to specify another mode, and sustain it on the ground that the two are concurrent. I cannot realize the idea of concurrent constitutional and statutory provisions and remedies. When the Constitution provides a means or rule, I consider it as paramount to statutory law. If the statutory provision is the same as the constitutional one, it is useless; if it be different, it must be inconsistent and derogatory, and, therefore, void. And it makes no difference, whether the statute be anterior or posterior to the Constitution. It is sufficient that the provision in the statute be different from that in the Constitution, to make it null. The 8th section of the 6th article of the Constitution, declares, that *all civil officers* shall be removable by an address of two-thirds of the members of both branches of the Legislature. We will suppose that body to pass a law, which should declare, that the tenure of office of all civil officers, except those specified, should be at the will of the Governor. Would such a law be constitutional? In my opinion it would not. The Legislature have no more right to dispense with a provision of the Constitution which imposes a duty, than it has to violate it; and it is not competent to that body to dispense with the exercise of a provision, so republican in its character as the one in question, and in-

Nicholson and another v. Thompson and another.

serted by the convention, as I have no doubt, for the very purpose of protecting public officers from executive influence, and placing them beyond its displeasure. The words, "all civil officers," it seems to me include every one. No exception can be intended when words so comprehensive are used.

The 8th section of the 6th article of the constitution contains two separate and distinct clauses. The first makes it the duty of the Legislature, to determine or fix the duration of the several public offices, when it is not fixed by the constitution; the second fixes the mode in which public officers are to be removed from office, a power conferred as much for protection as correction. It is not, to my mind, an argument entitled to any weight, to say, because the Legislature has not exercised its authority, and fixed the term of office of the Port Wardens, that, therefore, the other clause of the section is rendered nugatory, and controlled by an act of the Territorial Legislature. The argument will be new to the constitutional lawyers of this country; and I believe they will see with some surprise, a decision from the highest tribunal in this State, which establishes the doctrine that an act of the Legislative Council of the Territory of Orleans, is concurrent with the Constitution of the State, and, in relation to a particular class of civil officers, places them without its pale, simply because that act provides that the Governor shall appoint them when necessary.

The act of the Legislative Council of the Territory of Orleans declares, that the Governor "shall appoint, as often as it shall be necessary," fit and proper persons, Wardens of the Port, &c. The Constitution provides, that the Governor, by and with the advice and consent of the Senate, shall appoint all public officers, except those whose mode of appointment is otherwise provided for. Now, suppose the Governor of the State should, without the consent of the Senate, appoint a Port Warden, and when asked for his authority, should say, that the act of the Legislative Council was concurrent with the Constitution, and the appointment of Port Wardens an exception to it. What would be the reply to such an assumption? Every one would at once say, that the Governor has no such power; and why? Simply because the Constitution declares, that to make an appointment

Nicholson and another v. Thompson and another.

ment complete, the assent of the Senate is necessary ; and that to remove an officer, the assent of two-thirds of the Legislature is necessary. The mode of appointment and removal is fixed by the Constitution in a manner different from that prescribed by the statute, which constitutes the inconsistency, and consequent nullity of the statute.

In the argument, much reliance has been placed on what is alleged to be a fact, that the acts of the Territorial Legislature were prepared and passed in the English and French languages, and that the law in one language was as obligatory as in the other. I do not consider the argument one of much weight, in coming to a correct conclusion ; but it happens to be a fact, that the acts of 1805, were not prepared and passed by the Legislative Council in both languages. The acts of that session were translated by Mr. Moreau Lislet into French, and published in the pamphlet edition of the laws with his certificate, as interpreter, that they were correctly translated. The case cited by the counsel for the defence, from 2 Martin's Reports, 177, for the purpose of proving that both texts were to be considered as law, declares, that "since the year 1806, inclusively, the acts of the Legislature are passed in both languages, and an original in each receives the signature of the Speaker of the House of Representatives, the President of the Council, and the approbation of the Governor. So that they are both the text, and the practice is to construe them together." The history of the country shows that this statement is true. So that whatever force the argument was expected to have, is entirely destroyed by the fact being in opposition to what was supposed. But give the defence the full benefit of the French text, and I do not see that the case is much strengthened by it. The Governor shall appoint when he shall judge it necessary. This means when it is indispensable, unavoidable, or essentially requisite. The mere volition of the Governor is not, therefore, the tenure of office, according to the true intent and meaning of the law. The public necessity is to be considered, and the Governor is not justified in acting, except upon its being apparent that it is for the public interest that he should.

It has also been much insisted on, that under the Territorial Government, the Governor could appoint and remove the Wardens

Nicholson and another v. Thompson and another.

of the Port. This I am not disposed to contest. But it does not prove that he can do both now; and if he cannot now appoint without the concurrence of the Senate, I repeat the question, how can he remove without the assent of two-thirds of the Legislature? Under the Territorial Government, the Governor appointed officers without the concurrence of any body of men whatever; he removed them in the same manner; and it is well understood, that the Governor of the Territory exercised his authority freely, and in a manner not at all satisfactory to all persons. It is further known, that some of the prominent members of the convention were very jealous of the executive power; and, it being supposed by many, that the Governor of the Territory would, in all probability be the first Governor of the State, I have but little doubt that the 8th section of the 6th article was inserted in the Constitution, as a check upon the power of the executive and as a security for the independence of officers under the State Government.

Believing, as I do, that the Governor had no power to supersede the plaintiffs in their offices, by appointing the defendants to fill the same situations, I am of opinion that the appointments are null and void. I regard that part of the statute which relates to the appointment of Port Wardens, as inconsistent with the Constitution, and, therefore, of no effect.

I think the judgment ought to be affirmed.

Roselius and *Mazureau*, for the plaintiffs.

Larue, *Soulé*, and *Preston*, Attorney General, for the appellant.

SAME CASE—APPLICATION FOR A RE-HEARING.

The Supreme Court, as the guardian of the constitutional rights of the people, is authorized to pronounce on the constitutionality of the acts of the two other departments of the government; but no act of either will be pronounced unconstitutional unless manifestly so, and the incompatibility with the Constitution must be evident.

Roselius, for a re-hearing. The great importance of the ques-

Nicholson and another v. Thompson and another.

tion involved in this cause, and a strong conviction that the opinion pronounced by the majority of this honorable court is erroneous, will, I trust, be considered as a sufficient justification for making this last effort to impart to your Honors, if possible, the depth and sincerity of that conviction.

The Constitution of a State, (in the eloquent language of the Supreme Court of the United States,) is stable and permanent, not to be worked upon by the temper of the times, nor to rise or fall with the tide of events; notwithstanding the competition of opposing interests, and the violence of contending parties, it remains firm and immovable as a mountain amidst the strife of storms, or a rock in the ocean, amidst the raging waves. It is a clear position, that if a legislative act oppugns a constitutional principle, the former must give way, and be rejected on the score of repugnance. It is a position equally clear and sound, that in such case, it will be the duty of the court to adhere to the Constitution, and to declare the act null and void. The Constitution is the basis of legislative authority; it lies at the foundation of all law, and is a rule and commission by which both legislators and judges are to proceed. It is an important principle, which, in the discussion of questions of the present kind, ought never to be lost sight of, that the judiciary in this country is not a subordinate, but a co-ordinate branch of the government.

If the great principles of constitutional law here proclaimed, are correct, and that they are, I presume, no one will deny, I am utterly at a loss to conceive by what process of reasoning the mind can be brought to the conclusion, that the removing power, which is now, for the first time, claimed by the Governor of this State, can, in any case, be derived from any other source than the Constitution. The Government itself is the creature of the Constitution. And all the powers of the three great departments of the government are chalked out and delegated by it. Now to contend that a power, the exercise of which is prohibited by the Constitution, can, nevertheless, be asserted under a law anterior to that instrument, is, to say the least of it, a novel proposition. I can understand that laws enacted subsequently to its adoption, conferring powers on the different branches of government, may be viewed as a legislative interpretation of, or as carrying into

Nichelson and another v. Thompson and another.

effect, the Constitution, and as such, entitled to great respect. But I cannot comprehend, how an important political power can be assumed under a law antecedent to the Constitution. That question, however, will be more fully discussed in another part of this argument.

In the opinion delivered by the majority of this honorable court, the doctrine is fully recognized, "that the people of Louisiana have thought proper to separate the appointing from the removing power;" and, "that under the Constitution of Louisiana, the Governor is without authority to remove an incumbent from office, whenever the duration of that office has been fixed and determined by law, whatever may be its duration, whether it be for a term of years, or during good behavior." But an exception to this rule is established, by the court, "in reference to those offices which existed previously to the Constitution, and which have not since been limited by law." His Honor, Judge MORRIS, uses language equally strong and explicit. He says: "I wish it to be distinctly understood, that a majority of this court, in sustaining the appointments which give rise to this controversy, do do not do it on the ground assumed in the argument, that there is in the Executive of this State, a right of removal, which is incidental to his power of appointment; we hold, on the contrary, I believe unanimously, that the Governor alone, or the Governor and Senate, have no such power. It is clear, that the framers of our Constitution had in view the doctrine which had obtained under the Federal Government, that the power of removal belonged to the President alone, as an incident of his power of appointment, when they made it the duty of the Legislature to determine the time of duration of the several public offices, and prescribed a specific mode of removal for all civil officers." (8th section of the 6th article of the Constitution.) And in another part of the same opinion, it is said: "The Governor alone, or the Governor and Senate, would have vainly attempted to remove the Master and Wardens of the Port of New Orleans, without making new appointments, because the power of removal does not reside in them. But their power of appointment, under the law of 1805, is not the less legal and constitutional, because it may have for its consequence the removal of the former incumbents."

Nicholson and another v. Thompson and another.

Thus, then, it is expressly decided, that, under the Constitution of Louisiana, the power of removal is not incidental to the appointing power; and that neither the Governor alone, nor the Governor and Senate collectively, are vested with the power to remove a public officer. But it is, at the same time, gravely asserted, that although the Governor and Senate have no power to remove the plaintiffs, yet they can attain the same end by making new appointments! In other words, that the plain behest of the Constitution can be evaded, and its great objects defeated, by the Chief Magistrate of the State, bound by a solemn oath to support and obey its mandates, by resorting to a mere quibble—a subterfuge—a trick. Surely, before such an astounding doctrine finally receives the sanction of this exalted tribunal, your Honors may well pause, in order to be fully convinced that there is not some insidious fallacy hid in the apparently specious argument which leads to such a result.

The court seems to take for granted, that the law of 1805, authorizes the Governor to renew his appointments of Port Wardens whenever he thinks proper. There can be no doubt, that the Governor of the Territory of Orleans possessed such a power. But it may well be questioned whether he derived it from the act of 1805. That functionary, as the court justly observes, derived his authority from Congress, and that authority was little inferior to that of a Governor General of a Spanish Province. He had unlimited power to appoint, and remove, all the inferior officers of the territorial government at his sole will and pleasure. Hence, it is clear, that he possessed the power of removing the Port Wardens, independent of the act of 1805. It is a remarkable fact, however, that even the Governor of the Territory never exercised the power of removal with regard to the Port Wardens. The attempt now made, is the first on record, since the office was created in 1805. The law of 1805, in its terms, only confers on the Governor power to appoint, whenever it shall become *necessary*. It provides, "that it shall be lawful for the Governor of this Territory to appoint, as often as shall be necessary, one fit and proper person to be Master, and three other fit and proper persons to be Wardens of the said Port of New Orleans," &c. Could even the Governor of the Territory, by virtue of this provision of law,

Nicholson and another v. Thompson and another.

have appointed Port Wardens, when there existed no necessity for the appointment? He is empowered to act on the *happening* of a contingency; and not to *create* that contingency. It is said, that he is the sole judge, whether the necessity exists, on which the exercise of his power to appoint depends. Admitting for the present, and only for the sake of the argument, that a law, conferring political power on the Governor of the Territory, can be invoked by the Executive of the State—(a proposition, which appears to me, wholly untenable, as I shall endeavor to demonstrate hereafter)—has the Governor, in the case before the court, given any decision as to the existence of that necessity? I am answered in the affirmative, and told that the new appointments are evidence of such decision. But I must be permitted to intimate a doubt, whether this conclusion is fairly deducible from the premises. Indeed, we are not left to inference, or permitted to indulge in conjecture in this matter. The truth is notorious. The new appointments were not made on the score of necessity, but with the sole view of extending executive patronage for party purposes. It is openly and unblushingly avowed, that the plaintiffs have been *punished* for opinion's sake—that they have been sacrificed on the altar of intolerance and persecution. It is a well known fact, that they are among a host of worthy officers who have, within the last few months, fallen victims to an odious and detestable system of proscription, lately introduced into our fair State. This is the *necessity* on which the Governor has acted—no other. The fact, then, of having made new appointments does not, *per se*, prove that even the Governor himself considered it *necessary* to do so, unless a desire to reward his political adherents, and to punish those who differ from him in politics, constitute that necessity. With whatever effrontery unprincipled demagogues, or brawling politicians, may proclaim from the house-tops and in the market-places, that "*the spoils belong to the victor*," such an infamous doctrine can never receive the sanction of a court of justice.

As to the argument drawn from the translation of the law of 1805 into the French language, it is founded on the erroneous impression, that the laws of that year were passed in both languages; or, in other words, that both languages are to be con-

Nicholson and another v. Thompson and another.

Thus, then, it is expressly decided, that, under the Constitution of Louisiana, the power of removal is not incidental to the appointing power; and that neither the Governor alone, nor the Governor and Senate collectively, are vested with the power to remove a public officer. But it is, at the same time, gravely asserted, that although the Governor and Senate have no power to remove the plaintiffs, yet they can attain the same end by making new appointments! In other words, that the plain behest of the Constitution can be evaded, and its great objects defeated, by the Chief Magistrate of the State, bound by a solemn oath to support and obey its mandates, by resorting to a mere quibble—a subterfuge—a trick. Surely, before such an astounding doctrine finally receives the sanction of this exalted tribunal, your Honors may well pause, in order to be fully convinced that there is not some insidious fallacy hid in the apparently specious argument which leads to such a result.

The court seems to take for granted, that the law of 1805, authorizes the Governor to renew his appointments of Port Wardens whenever he thinks proper. There can be no doubt, that the Governor of the Territory of Orleans possessed such a power. But it may well be questioned whether he derived it from the act of 1805. That functionary, as the court justly observes, derived his authority from Congress, and that authority was little inferior to that of a Governor General of a Spanish Province. He had unlimited power to appoint, and remove, all the inferior officers of the territorial government at his sole will and pleasure. Hence, it is clear, that he possessed the power of removing the Port Wardens, independent of the act of 1805. It is a remarkable fact, however, that even the Governor of the Territory never exercised the power of removal with regard to the Port Wardens. The attempt now made, is the first on record, since the office was created in 1805. The law of 1805, in its terms, only confers on the Governor power to appoint, whenever it shall become *necessary*. It provides, "that it shall be lawful for the Governor of this Territory to appoint, as often as shall be necessary, one fit and proper person to be Master, and three other fit and proper persons to be Wardens of the said Port of New Orleans," &c. Could even the Governor of the Territory, by virtue of this provision of law,

Nicholson and another v. Thompson and another.

have appointed Port Wardens, when there existed no necessity for the appointment? He is empowered to act on the *happening* of a contingency; and not to *create* that contingency. It is said, that he is the sole judge, whether the necessity exists, on which the exercise of his power to appoint depends. Admitting for the present, and only for the sake of the argument, that a law, conferring political power on the Governor of the Territory, can be invoked by the Executive of the State—(a proposition, which appears to me, wholly untenable, as I shall endeavor to demonstrate hereafter)—has the Governor, in the case before the court, given any decision as to the existence of that necessity? I am answered in the affirmative, and told that the new appointments are evidence of such decision. But I must be permitted to intimate a doubt, whether this conclusion is fairly deducible from the premises. Indeed, we are not left to inference, or permitted to indulge in conjecture in this matter. The truth is notorious. The new appointments were not made on the score of necessity, but with the sole view of extending executive patronage for party purposes. It is openly and unblushingly avowed, that the plaintiffs have been *punished* for opinion's sake—that they have been sacrificed on the altar of intolerance and persecution! It is a well known fact, that they are among a host of worthy officers who have, within the last few months, fallen victims to an odious and detestable system of proscription, lately introduced into our fair State. This is the *necessity* on which the Governor has acted—no other. The fact, then, of having made new appointments does not, *per se*, prove that even the Governor himself considered it *necessary* to do so, unless a desire to reward his political adherents, and to punish those who differ from him in politics, constitute that necessity. With whatever effrontery unprincipled demagogues, or brawling politicians, may proclaim from the house-tops and in the market-places, that "*the spoils belong to the victor*," such an infamous doctrine can never receive the sanction of a court of justice.

As to the argument drawn from the translation of the law of 1805 into the French language, it is founded on the erroneous impression, that the laws of that year were passed in both languages; or, in other words, that both languages are to be con-

Nicholson and another, v. Thompson and another.

considered together, and construed with reference to each other as one text. The fact is different. In 1805, the laws were passed in the English language only; and afterwards translated for the benefit of those who did not understand that idiom. The translation of the law in question is erroneous, and, of course, cannot control the original.

Be this, however, as it may. I apprehend it is of little importance to a correct decision of the present controversy, whether, under the Territorial Government, the tenure of the office of Port Wardens, was at the will of the Governor, or not. It will hardly be pretended, that the Executive of the State of Louisiana possesses the same powers which were vested in the Governor of the Territory of Orleans. The Constitution has granted to the Executive of the State, the power to appoint officers, by and with the advice and consent of the Senate, and has authorized him to make temporary appointments to fill vacancies happening during the recess of the General Assembly, without the co-operation of the Senate; but has expressly withheld from him the power of removal. Now, does it not result, from the very nature of things, that the appointing power cannot be exercised, unless there be an office vacant? Can an officer be appointed if there is no office to be filled? The officer and the office are co-relative—the one cannot exist without the other. I can imagine but five ways in which an office can be, or become vacant: by the creation of a new office, by the expiration of the term of the incumbent, by his death, his resignation, or his removal. In the case under discussion, the office of Port Wardens was not vacant when the new appointments were made. The strange anomaly is, therefore, presented, of officers being appointed, when there was no office to be filled.

The solution of the question, whether the Governor of the State can remove or supersede the Port Wardens, by virtue of the act of 1805, depends, I humbly conceive, not so much on the inquiry, whether or not there is a repugnancy or inconsistency between the 6th section of the 6th article of the Constitution and that law, as on a correct understanding of the great principles which must necessarily govern the interpretation of the fundamental compact by which the government itself is organized.

Nicholson and another v. Thompson and another.

In the language of the court, "*the people of Louisiana have thought proper*," in their Constitution, "*to separate the appointing from the removing power.*" With such a clear enunciation of the constitutional principle, is it not a somewhat extraordinary proposition to contend, that the will of the people, thus solemnly expressed, can be disregarded, under color of a legislative enactment antecedent to the Constitution? In republican governments, all political power emanates from the people; and is delegated by them in the Constitution. The power of removal is called by Chancellor Kent, one of a transcendent nature. On what ground, then, can it be argued, that such a power can be sustained by an act of the Legislative Council of the Territory of Orleans? That body legislated for a temporary government, without any other Constitution than the act of Congress creating the Territory of Orleans, and its laws were subject to the revision of Congress. In the case of *The Church of St. Francis of Pointe Coupée v. Jean Martin*, 4 Robinson, 62, decided in February last, it was urged, that the provisions of the Treaty of Cession, relative to the free exercise of the Catholic religion, were yet in force in this State. But the court observed: "Since the 30th of April, 1812, the day on which Louisiana took her rank as an independent State among her sisters, that article of the treaty has ceased to have any practical effect whatever; and has now become obsolete. The promised protection was that of the United States, which abandoned the power by the erection of the Territory into a State fully able to afford her citizens, and even strangers within her jurisdiction, every needed protection."

If the Governor of the State can derive his authority to remove the Port Wardens from the act of the Legislative Council of the Territory of Orleans, then we are led to the absurd conclusion, that a portion of the political power with which our government is invested, does not emanate from the people, but from a body, exercising its subordinate legislative power, seven years before the people of Louisiana assumed the high prerogative of self-government.

Let it not be supposed, that, in advancing this argument, I have lost sight of the clause in the Constitution, which provides, that "*all laws now in force in this Territory, not inconsistent with*

Nicholson and another v. Thompson and another.

this Constitution, shall continue and remain in full effect, until repealed by the Legislature." This clause, as well as that relative to the continuance in office of the Governor, Secretary, Judges, and all other officers, was necessary to prevent anarchy and confusion. Without it, we would have had a government without laws. But the laws here spoken of, cannot embrace such as confer political power on any department of the government. All those powers are delegated by the Constitution itself. It is true, the office of Port Wardens was created by the act of 1805. But I deny, that the Governor of the State of Louisiana, can, or does, appoint those officers under it. That law authorizes the Governor of the Territory of Orleans to make the appointment. And, as before observed, there is no provision in the Constitution which transfers the powers vested in that officer, to the Governor of the State. To contend for the proposition, that the Executive can exercise all the powers formerly possessed by the Governor of the Territory, will irresistibly lead to the conclusion, that, instead of being blessed with a Chief Magistrate, whose powers and duties are defined in a written Constitution, we are cursed, with an almost absolute despot, wielding the same unlimited authority as a Governor General of a Spanish Province. To confound the powers of the Executive of the State, with those of the Governor of the Territory, is, in my humble opinion, a palpable error. The appointing power of the Governor of the State of Louisiana, like all his other powers, is derived from the Constitution; and he can only exercise it in the mode pointed out in that instrument. Under the general appointing power granted to him by the Constitution, he appoints the Port Wardens, as well as all other officers, without regard to the law of 1805. According to this view of the subject, which I believe to be a correct one, it is perceived that the question of consistency, or repugnancy, between the Constitution and the act of 1805, does not arise at all.

The position taken by his Honor, Judge Garland, which the whole bar, (with the exception of the counsel for the appellants) spontaneously pronounced to be unanswerable, is in perfect harmony with, and comes in support of my argument; I allude to that part of his dissenting opinion in which he says—

Nicholson and another v. Thompson and another.

"When the Constitution fixes a rule of action, or directs the mode in which a certain thing is to be done, I do not believe, that the Legislature has the power to specify another mode, and sustain it on the ground, that the modes are concurrent. I cannot realize the idea of concurrent, constitutional, and statutory provisions and remedies. When the Constitution provides a means or rule, I consider it paramount to statutory law. If the statutory provision is the same as the constitutional, it is useless; if it be different, it must be inconsistent and derogatory, and therefore void."

The majority of this honorable court has, however, placed its opinion on the ground, that the law of 1805 is not repugnant to the Constitution, except so far as to require the co-operation of the Senate, in the appointment of the Port Wardens; and that, by virtue of that law, the Governor, by, and with the advice and consent of the Senate, can appoint at will, and by that means *remove*, or, rather *supersede* the incumbents of the office. I will, therefore, examine the question of repugnancy.

And in the first place, I beg leave to observe, that although in many cases it may be true, that "*the same rules which govern in the construction of statutes are applicable to the Constitution, when supposed to conflict with an act of ordinary legislation;*"—yet, I believe, that in the present case, that is not the proper test of consistency, or repugnancy, between the Constitution and the law. In ordinary controversies, arising out of private interests, when the constitutionality of a law is questioned, the well established rule is, that "the question, whether a law is void for its repugnancy to the Constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in a doubtful case. It is not on slight implication, and vague conjecture, that the Legislature is to be pronounced to have transcended its powers, and its acts to be declared void. The opposition between the Constitution, and the law, should be such, that the Judge feels a clear, and strong conviction of their incompatibility with each other." *Fletcher v. Peck*, 6 Cranch, 87. But when, as in the present case, a question arises, whether a great political power can be exercised by a branch of the government under a law antecedent to the Constitution, it seems to me, that different prin-

Nicholson and another v. Thompson and another.

ciples apply? The inquiry, in such a case, is not simply, "*is the act declaring the office of Port Wardens to be at the will of the Executive, repugnant to that clause of the Constitution, which authorizes the removal of public officers by an address of two-thirds;*" but, whether the exercise of the power is prohibited by the Constitution? This I think, is the only fair, and proper mode of putting the question. And when thus propounded, it is not difficult to solve it.

As has before been seen, your Honors all agree, that "*the people of Louisiana, have thought proper to separate the appointing from the removing power;*" and that "*the Governor alone, or the Governor and Senate, would have vainly attempted to remove the Master and Wardens of the Port of New Orleans, without making new appointments, because the power of removal does not reside in them.*" Then, with due deference, there is an end to the argument; and it is impossible for the most expert dialectician to deny, that there is the most palpable repugnancy between the Constitution, and the act of 1805. The Constitution prohibits the Governor, as well as the Governor and Senate, from removing any public officer; the law of 1805, (according to the construction given to it by this court,) authorizes the removal of the officers in question, at the will of the Governor and Senate. It is difficult to conceive a case of more direct and clear repugnancy.

The distinction attempted to be established between the act of removing, and of superseding an officer, is, to my mind, unintelligible. I own, that I am not sufficiently versed in casuistry to understand the difference between the one and the other mode of expression. In ordinary parlance, when we say, that an officer has been superseded, we mean, that he has been removed, and another appointed in his place. The same definition of the word is given by lexicographers. Webster, in his dictionary, informs us, that superseded means displaced, and he defines the word displace to be equivalent "*to remove from any state, office or dignity.*" Such likewise is the opinion of all the Constitutional lawyers of the Union. Story, in his Commentaries on the Constitution, vol. 3, p. 390, says: "*The language of the Constitution is, that the President shall nominate, and, by and with the advice*

and consent of the Senate, appoint, &c. The power to nominate does not naturally, or necessarily include the power to remove; and if the power to appoint does include it, then the latter belongs conjointly to the Executive, and the Senate. In short, under such circumstances, the removal takes place in virtue of the new appointment, by mere operation of law. It results, and it is not separable, from the appointment itself." See also the *Federalist*, No. 77, *Kent's Com.* vol. 1, p. 308, *et seq.* Indeed the idea, that there was any real difference between the removal of an officer by a new appointment, and that which takes place by a distinct and separate act, never before occurred to any person. It appears to me a mistake to suppose, that the removal in the present case, was the mere consequence of the new appointments. On the contrary, the new appointments constitute the very act of removal of the former incumbents. There is no sort of analogy between this case, and that cited, of Judges being legislated out of office, by abolishing the courts over which they preside. The appointment of a Judge, cannot abridge, or curtail the power of the legislative branch of the government, on a subject of general legislation. Consequently, it would be absurd to contend, that the Legislature could not make a change in the organization of the judiciary, because by abolishing a court, the tenure of office of the Judge of that court might be indirectly affected. I say, indirectly, because it is not true, that by abolishing the court, the Judge is removed from office. There is a wide difference between removing a man from an office, and abolishing the office. It would be a difficult matter to remove a person from an office which has ceased to exist. The law of 1825, abolishing Justices of the Peace, and creating the City Courts, is perfectly constitutional on another ground. Justices of the Peace, are not Judges within the the purview of the Constitution, nor is the tenure of their office protected by it. They have always been considered as ministerial officers, although invested with civil jurisdiction. That point has been decided and settled, both in different States of the Union, and in England.

But I contend, that the Legislature cannot, constitutionally, legislate a Judge out of office by abolishing the court over which he presides, if his removal be the sole object which the Legisla-

Nicholson and another v. Thompson and another.

ture has in view. Such a law, I think, would be clearly unconstitutional. The difficulty in such a case would be, how to establish the fact, that the intention of the Legislature was to remove the Judge. The impossibility of establishing that fact, would, no doubt, in a great majority of cases, make the constitutional objection unavailing. If, however, a case should occur, in which the intention was evident, no court, I trust, would shrink from the responsibility of declaring the law unconstitutional. Suppose, for instance, our Legislature, during its last session, had abolished the Criminal Court, and a few days, or weeks afterwards, had re-established the same court precisely as it before existed, would the Judge, under such circumstances, have lost his office? The practice of legislating Judges out of office has always been considered as unconstitutional. But it is one of those acts of lawless power, which the judiciary can seldom control.

The permanency and stability of our free, and liberal institutions, have justly excited the wonder, and admiration of the civilized world. But if the doctrine be once admitted, that "*it may sometimes happen, that in performing an act perfectly constitutional in itself, an object may be accomplished, indirectly, which could not be constitutionally done in a direct manner,*" it does not require the gift of prophecy to predict the impending fate of those institutions. The Constitution, instead of being the charter by which the rights and privileges of the citizen are guarantied and protected, will only call forth the exercise of sophistry and refinement to divine the most ready means of evading its provisions. The minions and instruments of power, will, before long, be found performing the same solemn farce among us, of which history furnishes so many examples. The ingenuity and flattery of the Roman lawyers fabricated the absurd story, that the people had divested themselves of, and delegated to the Emperors the whole legislative power, by the *lex regia*. With such a rule of interpretation, the Constitution would soon be frittered away, and its great landmarks of liberty demolished.

The well established and universal principle of law, as well as logic is, that whatever is not permitted to be done directly, cannot be done indirectly. It is, certainly, of infinitely more importance

Nicholson and another v. Thompson and another.

not to violate that rule with respect to the Constitution, than as it regards acts of ordinary legislation. The truth is, the idea is entirely inadmissible, and cannot be supported even by the color of a plausible argument. No possible case can be imagined, in which an unconstitutional object can be accomplished by constitutional, or legal means. To say so, is a contradiction in terms. It has already been seen, that the illustration by which the position is sought to be supported is not analogous.

The constitutional history of the country, presents many attempts, at different periods, to evade various provisions of the Constitution of the United States. One of the most striking instances, is the tax laid by the State of Maryland, on importers of foreign merchandize. In 1821, the Legislature of that State passed a law, requiring all importers of foreign goods by the bale, package, &c., to take out a license, for which they shall pay fifty dollars, &c. The State of Maryland endeavored to defend the constitutionality of that law, on the ground that it was enacted in the ordinary exercise of the taxing power. In noticing that argument, Chief Justice Marshall observes—

“But if it should be proved, that a duty on the article itself would be repugnant to the Constitution, it is still argued, that this is not a tax upon the article, but upon the person. The State, it is said, may tax occupations, and this is nothing more.

“It is impossible to conceal from ourselves, that this is varying the form, without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself. It is true, the State may tax occupations generally, but this tax must be paid by those who employ the individuals, or it is a tax on his business. The lawyer, the physician, or the mechanic, must either charge more on the article in which he deals, or the thing itself is taxed through his person. This the State has a right to do, because no constitutional provision extends to it. So, a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner, as a direct duty on the article itself would be made. This

Nicholson and another v. Thompson and another.

the State has no right to do, because it is prohibited by the Constitution." *Brown v. State of Maryland*, 12 Wheat. 419.

Many other cases might be referred to, in which "an unconstitutional object" was sought to be accomplished, by, what the parties considered, legal means. But such pretensions have always been repelled and discountenanced by the judiciary. It has uniformly been held, that an act which, in its direct tendency, infringes the Constitution, is unconstitutional.

Can it be reasonably argued, that notwithstanding the specific mode of removing public officers pointed out by the Constitution, there may be a concurrent power of removal in the Governor? The clause on the subject of removal is peculiar to the Constitution of Louisiana. A similar provision is not to be found in any of the Constitutions of the other States of the Union. As early as 1789, the question, whether the President of the United States possessed the power to remove public officers, as an incident to his appointing power, gave rise to a very animated debate in Congress. And although it was decided (in the House of Representatives by a small majority, and in the Senate, by the casting vote of the Vice President of the United States,) in favor of the existence of the power in the President, yet the correctness of that decision has been doubted by some of the greatest constitutional lawyers of the country. Among others, Chancellor Kent expresses his most decided dissent. He says, in his 14th Lecture, vol. 1, p. 311:—

"It is a striking fact in the constitutional history of our government, that a power so transcendent as that is, which places at the disposal of the President alone, the tenure of every executive officer appointed by the President and Senate, should depend upon inference merely, and should have been gratuitously declared by the first Congress, in opposition to the high authority of the *Federalist*; and should have been supported or acquiesced in by some of those distinguished men, who questioned or denied the power of Congress even to incorporate a National Bank."

The framers of the Constitution of Louisiana, were not ignorant of the discussions to which this question had given rise, and of the conflicting opinions which were entertained in relation to it. They took the subject into their serious consideration, and came

Nicholson and another v. Thompson and another.

to the conclusion, that it was safer and more republican to separate the appointing power from the removing power. With this view, the 8th section of the 6th article was inserted in the Constitution. The language in which that section is couched is clear and explicit ; it is as follows :

"The Legislature shall determine the time of duration of the several public officers, when such time shall not have been fixed by the Constitution ; and all civil officers, except the Governor, and Judges of the Superior and Inferior Courts, shall be removable by an address of two-thirds of the members of both Houses, except those, the removal of whom has been otherwise provided for by this Constitution."

The first part of this section of the Constitution enjoins on the Legislature, the duty of determining the duration of those offices, the tenure of which is not fixed by that instrument itself. The second branch of the section provided, as before stated, a specific mode of removing public officers without cause. The duty imposed, and the power conferred, are independent of each other. The removing power undeniably exists, although the duration of the office has not been determined. The correctness of this position is admitted in the opinion of the court. But the court says, that "in relation to an office originally within the discretion of the Executive, and the duration of which has not since been expressly limited by law, the power to create a vacancy by removal exists, at the same time, in the Governor and Senate, and in the General Assembly, under the 8th section of the 6th article of the Constitution." It is difficult to reconcile this mode of reasoning with the text of the Constitution on which it is based. A few lines before, the existence of the removing power in the Governor and Senate is most explicitly denied. "I do not mean to say, (observes his honor, Judge Bullard,) that the Governor and Senate may remove an officer, and make a new appointment, when the office has been limited by law. On the contrary, I am of opinion that he cannot," On what foundation does the distinction here taken rest ? We look in vain for it in the language of the Constitution. The expressions used are, "*all civil officers, except the Governor, and Judges of the Superior and Inferior Courts, shall be removable by an address,*" &c. Why should

Nicholson and another v. Thompson and another.

there be two modes in which the Port Wardens can be dismissed from office, when the Constitution has provided one uniform rule for the removal of all civil officers? Can the Governor and Senate remove an officer from an office created since the adoption of the Constitution, if its duration is not limited? It can hardly be denied, that the assumption of the power in such a case would be clearly unconstitutional. And it appears to me difficult to assign any good reason, why a law, anterior to the Constitution, should not be liable to the same objection.

Your Honors remark, that the 8th section of the 6th article of the Constitution must be construed in such a manner, as to give effect to its concluding sentence, to wit: "*except those, the removal of whom has been otherwise provided for in this Constitution.*" The correctness of this observation no one will contest; but it is not so easy to see its bearing on the question before the court. It cannot but be considered as entirely foreign to the subject under discussion, unless it be asserted, that the act of 1805, has been incorporated into, and forms a part of the Constitution. Such an idea is, of course, too extravagant to be insisted on by any one. The exception, evidently, refers to the 10th section of the 4th article, which provides—

"The Clerks of the several Courts shall be removable for a breach of good behavior by the Court of Appeals only, who shall be judge of the fact as well as of the law."

In this section, the Constitution of Louisiana has again adopted a different rule from that laid down in the Constitution of the United States. Under the latter, clerks of court hold their offices at the will of the Judges, on the principle that the power to remove is incidental to the appointing power, as was decided by the Supreme Court of the United States, in the case *Ex parte Hennen*, 13 Peters' Reports, 230. By our Constitution, the clerks of the several courts, are made independent officers, and can only be removed for a breach of good behavior. They enjoy, besides the exclusive privilege of being tried, in the first instance, before the highest tribunal in the State. No one ever dreamt that the Governor, or the Judges of the respective Courts, had a concurrent power with the Supreme Court, to remove clerks. Yet the

Nicholson and another v. Thompson and another.

identical expressions, "*shall be removable*," are used with regard to clerks and to *all civil officers*, &c.

MARTIN, J. The plaintiffs' counsel has favored us with a printed petition for a re-hearing; and as I had not the opportunity of detailing the reasons which induced me to concur in the opinion of the majority of the court when it was read, I am grateful for that which he has given me, of doing so, principally as he informs us, that the position taken by the dissenting Judge, was spontaneously pronounced to be unanswerable, by the whole bar, with the exception of the counsel for the appellants.

The petitioners state, that they were duly appointed by the Governor, with the advice and consent of the Senate, Port Wardens of New Orleans; that the tenure of their said offices is during good behavior; and that they cannot be deprived of them, except in the mode prescribed by the Constitution and laws;—that the defendants, have lately set up a claim to the offices, and pretend to have been appointed to supersede the petitioners under an appointment of the Governor, which is a mere arbitrary assumption of power, in violation of the Constitution and laws, and the vested rights of the petitioners.

On this statement they obtained an injunction, commanding the defendants to refrain from acting in the said offices, until the further order of the court. The petitioner concludes by a prayer, that the defendants, may be decreed not to be Port Wardens of New Orleans; that their commissions may be declared nullities, and the injunction perpetuated; and that they may be condemned to pay damages.

The defendant, Thompson, pleaded the general issue, and averred himself to have been duly appointed a Port Warden, and denied, that the petitioners had any cause of action, or any right to the remedy sought.

The petitioners had judgment, the injunction was perpetuated, and the defendant Thompson appealed. The sole question which the case presents, relates to the continuance of the power of the Governor, after the admission of the State into the Union, to appoint "as often as may be necessary," a Master and three junior Wardens for the port of New Orleans, under an act of the Legislative Council of the Territory of Orleans, of the year 1805.

Nicholson and another v. Thompson and another.

It is urged, that since the formation of the State government, the Governor can no longer appoint the Port Warden, whenever it is necessary, but only when there is a vacancy; because, except in the latter instance, the appointment is the removal of an incumbent, which is not within the Constitutional attributions of the Executive; the Constitution having provided no other mode of removal of a civil officer, except by impeachment, and, in case of other civil officers than the Governor, and Clerks of courts, by an address of a given number of members of both houses, of the Legislature to the Governor.

This argument assumes, that when a power is within the Constitutional attributions of one of the branches of government, it cannot be exercised, when an indirect consequence of its use is one of those, which that branch of government could not have directly produced; and it is said, that although the Governor may appoint a Port Warden, whenever it is necessary, he cannot do so when an indirect consequence of the appointment is the removal of an incumbent, which the Constitution does not permit the Governor directly to effect. It is not pretended, that either the Legislature of the United States, or of this State, can directly remove a Judge, otherwise than by the combined action of the Senate, and House of Representatives, *id est*, by impeachment by one, and judgment by the other; yet in the year 1802, the Legislature of the Union, exercising one of its Constitutional attributions, *id est*, the repeal of a law of a preceding Legislature, did not think itself prevented from exercising that power, although an indirect consequence of the repeal was the removal of all the incumbents of the judicial offices, which had been created by the law thus repealed.

About the year 1820, the Criminal Court of the First Judicial District of this State, was composed of three Judges, who were permitted to practice the law. This permission was thought improper, but it could not be withdrawn, without increasing the salary of the Judges, or reducing the number to one, and giving him the salary of the three.

The last alternative could have been easily obtained by an address of three-fourths of the Legislature, to the Governor, representing the utility of it; but it was thought best to repeal the law

which had established a court composed of three Judges, and to establish another composed of one. Thus, the two junior Judges, who could not have been removed by the direct action of the Legislature, were by the repeal of the law, which was within the Constitutional attributions of that body, indirectly removed.

When that court was directed to hold sessions twice a year, in the country parishes, of the First Judicial District, it was authorized to appoint an Interpreter in each parish; it was however soon ascertained, that the service could be better performed by the Interpreter, of New Orleans, and it was not deemed necessary, that the two houses should address the Governor, for the removal of the country Interpreter. This was done by a law which repealed the preceding under which those Interpreters had been appointed, and they were thus removed. In the year 1825, by the act establishing the City Court of New Orleans, all acts creating Justices of the Peace, and Constables within the City of New Orleans, its faubourgs, banlieus &c., were repealed; thus all those officers were removed without any impeachment, or address to the Governor. The repeal of the laws creating them, was within the constitutional attributions of a bare majority of the Legislature, with the assent of the Governor; and although the circumstance, that the repeal of the acts had, as one of its necessary consequences, the removal of those Justices of the Peace and Constables, who as the counsel for the plaintiffs, contends were removable only by the Governor, on the address of a given number of the members of both houses, it never was doubted, that the repeal was constitutional.

Here we have instances of Circuit Judges of the United States, holding their offices during good behavior, removed from office by an act of Congress. Judges of this State, Justices of the Peace, Constables, and Interpreters, removed by the repeal of the law which had created them; although it is clear, a direct removal of any of them could not have taken place, without an address from a given number of members of the Legislature to the Governor.

It is admitted, that the Port Wardens are among the officers whom the Constitution has declared to be removable by such an address; yet, if a new choice be within the constitutional attri-

Nicholson and another v. Thompson and another.

butions of the Governor, it must follow, that the removal of the former incumbent as legitimately follows from that choice, as that of the officers above mentioned, from the repeal of the laws creating them. But the counsel for the petitioners has contended, that the Constitution, having withheld from the Governor the power of removing the incumbent, he holds his office during his good behavior, and as the Judges, Clerks of courts, and Notaries Public, can only be removed by an impeachment, or the address of both houses, or at least, that he has a life estate in his office.

The Supreme Court of the United States has lately decided in the case, *Ex parte Hennen*, 13 Peters' Reports, 259, that in the Government of the Union, no office is held during good behavior, except those, the tenure of which has thus been fixed by the Constitution; and that the offices of those who were appointed for an unlimited period, are not held during life, but are determined by a new choice made by the appointing power.

The counsel for the petitioners has strenuously urged, that the clause in the Constitution of this State which renders all civil officers, except the Governor, and Clerks of courts, removable on the address of the Legislature, prevents the applicability of that decision to the present case. It is, therefore, proper to review the part of the Constitution he invokes. One of the learned counsel for the petitioners, has informed us, that he believes, that the provision is peculiar to the Constitution of this State; that he has carefully examined those of the other members of this Union, without finding any thing like it. I believe it may be traced to the legislation of Great Britain. In that country the commissions of the Judges were *durante bene placito nostro*, originally, and continued so until the thirteenth year of William the Third, when it was imagined, that their devotion to their country would be better secured by rendering them less dependent on the Crown, and more so on Parliament. Accordingly, by the 23d chapter of the acts of that year, it was provided, that their commissions should be *quamdiu bene se gesserint*, and that it might be lawful to remove them on the application of both houses of Parliament.

Notwithstanding this, it was held, that their offices were deter-

Nicholson and another v. Thompson and another.

mined on the demise of the King; and in the first year of George the Third, further to secure their independence, it was enacted, on the recommendation of the King, that the demise should no longer have that effect; and the statute has a clause continuing the right of Parliament to address the King for the removal of a Judge.

The framers of our Constitution thought it proper to modify the tenure of good behavior as it still exists in the United States; and established that, which was to prevail in Louisiana, on the footing of the British. They farther thought, that none should exercise any office whatsoever, if he rendered himself obnoxious to a great proportion of both houses of the Legislature. With a view absolutely to confirm the power of direct removal of officers in the same hands, and to prevent officers appointed for an unlimited period from being removed by a new choice of the appointing power, they directed the Legislature to fix the duration of the offices created for an unlimited period. Their object was evidently, to put an end to all tenures of office other than those of good behavior, or for a limited time; from which it is not a forced inference to conclude, that until the Legislature carried the views of the Convention into effect, those offices to which the Governor was by law authorized to appoint whenever he thought it necessary, should not be interfered with. They considered the inconvenience of so little importance, that the application of the remedy might be left to the Legislature. It does not appear to have paid any attention to the constitutional injunction, at least in regard to Port Wardens. The territorial law which first called them into existence, has until now been considered as being still in force, with the modification, that the advice and consent of the Senate are necessary to their appointment, and that the period for which they are to serve is to be fixed by the Legislature. Until then, their tenure is neither good behavior nor for life, but until the Governor, deeming it necessary, makes an appointment. The injunction would have been more effectual, if it had extended to offices thereafter created. The Legislature, however, thought proper to create offices, to be exercised during an unlimited period; Inspectors of flour, tobacco, and Interpreters of courts are among the number; and, in

Nicholson and another v. Thompson and another.

one instance at least, a Judge, that of the Criminal Court of New Orleans, thought, as the present executive of the State, that the power which the law had given him to appoint an Interpreter to his court, without any limitation as to time of service, included that of making a new choice, *toties quoties*, it appeared to him necessary, and the power was exercised in the year —. No impropriety was then attributed to this act. Indeed, the removal of the incumbent by the Judge, did not impugn the right of the Governor to remove the Interpreter on the address of both houses. The magistrate who then filled the bench of that court, was a person of great legal acquirements, Judge Turner. Admitting that it is not too late to say, that these repeals, and that appointment were unconstitutional acts, it is certainly too late to say, that they were clearly so, and that their constitutionality cannot be contended for. The counsel for the plaintiffs calls upon us to say, that the Governor's appointment of the defendant, Thompson, as a Port Warden, was an arbitrary assumption of power, in violation of the Constitution. The Judges of this court have always considered themselves as the guardians of the constitutional rights of the people, and as such, authorized to pronounce on the constitutionality of the acts of the two other departments of government; but we cannot say, that any act of theirs is unconstitutional unless it be manifestly so, and the question is not susceptible of doubt. *Syndics of Brooks v. Weyman*, 3 Mart. 12. In the case of *Johnson v. Duncan et al.*, *Syndics*, Id. 553, we held, that it is only in cases where the incompatibility of the law with the Constitution is evident, that courts will go the length of declaring null an act which emanates from legislative authority. In *Fletcher v. Peck*, 6 Cranch, 87, Chief Justice Marshall, says; "the question whether a law be void for its repugnancy to the Constitution, is at all times, a question of much delicacy, which ought seldom if ever to be decided in the affirmative in a doubtful case. —It is not on slight implication, and vague conjecture, that the Legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the Constitution and the law, should be such, that the Judge feels a clear, and strong conviction of their incompatibility with each other."

Nicholson and another v. Thompson and another.

There can not be any doubt, that this court is bound to test the constitutionality of the acts of the second branch of the Government of the State, when called upon by a suitor. But it is our duty, and it will always be our inclination, to examine such acts with that attention, caution, and respect, which we use in the examination of the acts of the first branch. Either of those branches is the proper Interpreter of the Constitution, in every case in which it acts within its legitimate sphere ; and its interpretation will be entitled to the respect of both the others. The discrepancy from the Constitution, if doubtful, will not be pronounced by the third branch. The Governor was within his constitutional attributions, when he acted on the question whether the appointment of a Port Warden was necessary. It was his duty to consult the Constitution, and to determine whether it opposed any obstacle to the exercise of his power.

The Senate, on the nomination of the defendants, were bound to inquire into its constitutionality before they sanctioned it with their advice and consent, which are the best evidence we can have, that, in their opinion, it was constitutional.

The best attention which I have been able to give to the arguments offered for a re-hearing, have not convinced me, that we err in sustaining the pretensions of the defendant, Thompson ; much less, that his appointment was a violation of the Constitution.

I regret, that in his printed petition, the counsel for the plaintiffs has forgotten himself so far as to indulge in animadversions on the motives and conduct of the Executive, which nothing in the record justifies.

I am of opinion, that no re-hearing shou'd be granted, and I am commanded by the court to say, that it is refused.

Wiggin and another v. Flower and another.

JEREMIAH T. WIGGIN and another v. WILLIAM FLOWER
and another.

Legal subrogation results from the payment of a bill of exchange, or promissory note, by an endorser, though made before maturity. The endorser is included in the third paragraph of art. 2157 of the Civil Code, he being bound with, or for the maker or acceptor, and the article referring to all obligations whatever, whether absolute or conditional.

Though the obligation of an endorser or surety cannot be enforced till after the event on which it becomes absolute, it exists from the time when it was contracted, for it is susceptible of being compromised, released or transferred, and of passing to heirs, &c. So the rights of the endorser, or surety, against the maker or principal, exist before the obligation of the former becomes absolute.

In art. 2130 of the Civil Code, the word *co-obligée*, by an error of the press, is used for *co-obligor*.

The provision of art. 2130 of the Civil Code, which declares, that "an obligation may be discharged by any person concerned in it, such as a co-obligor or a security," recognizes the right of a co-obligor, surety, or any person, like them, concerned in the obligation, to pay, before his obligation becomes absolute; and the subsequent clause of the same article, which provides that payment by a person in no way concerned in the obligation does not give rise to subrogation, virtually declares that payment by a co-obligor, surety, or other person concerned in it, does create such subrogation.

Endorsers and sureties are, under the Civil Code, conditional obligors of the creditor of the maker and principal, and at the same time, conditional creditors of the latter. Though no conservatory acts can be exercised against the conditional debtor by endorsement, until his obligation becomes absolute, both the endorser and the surety, may, under art. 2037 of the Civil Code perform all acts conservatory of their respective rights, even before their own obligations have become absolute.

A surety can claim nothing more than indemnification.

The rights of a surety subrogated to those of a creditor, whether payment was made before the obligation of the surety became absolute, or after, result from his original contract with his principal, and are restrained by it. Those of an endorser, not for accommodation, in the same situation, are under no restraint from his original contract with the maker, or acceptor, to wit, that the whole amount of the bill should be paid to him, or his order. *Aliter*, as to an accommodation endorser, who, being viewed as a surety, will be restricted to the sum actually paid by him.

No obligation or right can result to any one from an act or contract, to which he was not a party, until he manifests his intention to avail himself of such right.

Plaintiffs accepted a bill payable at a future period, which was endorsed by the payee to third persons, by whom it was endorsed to a Bank, which discounted the bill in their favor. The latter having paid the bill, before maturity, in notes of the Bank, which were under par, claimed the whole amount of the bill from the acceptors. *Held*, that plaintiffs did not, by the endorsement and discount of the bill, and the subsequent depreciation of the notes of the Bank, acquire *ipso facto*, any more

Wiggin and another v. Flower and another.

than an inchoate and incomplete right to pay in such depreciated notes, not being parties to any act or contract from which such a right might result; that not having manifested any intention to avail themselves of the advantage which the depreciation of the Bank notes offered, until, by the payment of the bill, the endorsers had acquired the rights of the Bank thereto, plaintiffs were in the same situation in which they would have been, had the Bank transferred the note at any time after its discount; and that, by their acceptance, plaintiffs bound themselves to pay to the order of the payee, the whole amount of the bill, that the endorsers became entitled thereto by the transfer of the bill, that the Bank acquired their rights by the discount, and that, the endorsers, by the payment of the bill, acquired a legal subrogation to the rights of the Bank.

Ordinary endorsers are not placed on the same footing as sureties; nor can they, like the latter, claim the benefit of discussion.

APPEAL from the Commercial Court of New Orleans, *Watts, J.* The petitioners represent, that one Elam Bowman, drew a bill of exchange on them, in favor of A. L. Gaines, for \$826 66, payable five months after date; that the bill was accepted by the petitioners, and endorsed by A. L. Gaines, to A. L. Gaines & Brother, who endorsed it to the Union Bank of Louisiana, by which the bill was discounted *for account of* A. L. Gaines & Brother; that the bill thus became the property of the Bank, and that due notice was given to the petitioners that the bill was there, payable at maturity, to wit, on the 7th—10th of August, 1842. They represent that, on or about the 11th July, 1842, before the maturity of the bill, the defendants gratuitously, and without being authorized by the petitioners, paid the bill, while in the possession of the Union Bank, in the depreciated notes of that institution; and that having thus possessed themselves of the bill, they deposited it for collection in the Bank of Louisiana, where the petitioners have been notified to pay the same, at maturity, in specie. The petitioners further allege, that by the said payment, before maturity, their obligation as acceptors, as well as that of the prior parties to the said bill, has been extinguished; that the defendants, the present holders, took the bill with full knowledge of all these facts; that they have no legal title to it, nor any right to demand payment thereof from the petitioners, who claim that the bill shall be given up to them to be cancelled and destroyed.

The petitioners prayed that the bill might be sequestered pending the suit, and be delivered up to them to be destroyed. The bill was filed on the 6th August, 1842.

Wiggin and another v. Flower and another.

The defendants answered by a general denial. They pleaded, in reconvention, that they are the holders and owners, for a valuable consideration, of the bill described in the petition, which they aver was transferred to them, in the regular course of business, before maturity, and under circumstances which entitled them to believe that all the parties thereto were bound by their signatures. They denied that they paid the note in Bank, or elsewhere, or knew of its having been paid, or of any fact calculated to excite their suspicion, or to deprive them of the rights of *bona fide* third holders of a negotiable instrument, acquired for a valuable consideration, before maturity. They pray that the plaintiffs may be condemned to pay them the amount of the note, and for general relief, &c.

The plaintiffs answered the demand in reconvention, by a general denial, annexing interrogatories to be propounded to the defendants, whose answers thereto were substantially: that the defendants received the bill from A. L. Gaines & Brother, between the 9th and 12th of July, 1842, and that they deposited it for collection in the Bank of Louisiana, on the 28th of July, 1842. That from the red marks and figures on the bill at the time when they received it, they concluded that it had been discounted in the Union Bank, and that it had been taken up by A. L. Gaines & Brother, who had had it discounted. That Gaines & Brother informed them, that they took up the bill because they were about to absent themselves for the summer, and were unwilling to risk being dishonored as endorsers, and not because they wished to speculate in the depreciation of the notes of the Union Bank. That the bill was received by the respondents, with two other notes, with a request to make certain payments for Gaines & Brother, amounting to about \$710, and to reimburse the amount, and a balance of \$315 35, previously due, out of the proceeds of the bill and notes. The bill was to be returned to Gaines & Brother, in case of non-payment, on their satisfying the debt due by them to the respondents. That no settlement or arrangement has been made with reference to the bill, except that the demand in reconvention is now conducted for the benefit of Gaines & Brother, though instituted at first for respondents' own account, as, since the filing of the demand in reconvention, they have collected from the other notes left in their

hands, sufficient to satisfy the debt due them by Gaines & Brother.

It was proved, that the notes of the Union Bank were at a discount at the time of the payment of the bill. *Chalin*, a note-clerk of the Union Bank, testified, "that the acceptance of the plaintiffs, discounted in the Union Bank of Louisiana, due the 7th—10th of August, 1842, being the draft in contest, was paid in said Bank on the 11th July, 1842. That it was understood, that the payment was made by or for account of the acceptors, though no inquiry was made on the part of the Bank, when the acceptance was paid. That drafts or notes discounted in the Union Bank, have never been negotiated or transferred by it. That the acceptance of the plaintiffs could not have been obtained from the Bank, but by payment, at the time said acceptance was paid; and that the notes of the Union Bank were at a discount.

There was judgment in the Commercial Court dismissing the plaintiffs' petition, and in favor of the defendants, on their demand in reconvention, for the amount of the bill, with interest from maturity. The plaintiffs appealed.

Bradford, for the appellants. The evidence clearly establishes that the bill was paid on the 11th July, 1842. *Holland v. Peirce*, 2 Mart. N. S. 503. Civil Code, arts. 2048, 2130. The payment extinguished the obligation of the acceptors. See *Ib.* art. 2130, and the case from 2 Mart. N. S. 2 Kent's Comm. 616, 617. *Chitty on Bills*, 543. 7 *Toullier*, 125. Liv. 3, tit. 3, chap. 5. §. 102, 12 *Duranton*, 29, tit. 3, § 18. 32 *Merlin*, Rep. de Jurisprudence, p. 42, *Verbo* Subrogation de Personne. It is contended, that the endorsers who paid the bill in the Union Bank, were so bound on the bill as endorsers, that they had an interest in paying it, and that consequently, they were legally subrogated, on payment, to the rights of the holders, whom they paid. But it is answered, that the obligation of an endorser, is conditional only, and does not arise, till after protest of the bill, and legal notice of its dishonor; and, therefore, he cannot pay the bill, with the benefit of a legal subrogation, till his liability has become fixed. Such is believed to be the settled doctrine of the French law on this point. 12 *Duranton*, 172.

But should it be held, that a legal subrogation does take place

Wiggin and another v. Flower and another.

in favor of the endorser, who anticipates his liability by payment of the bill before maturity, what is the extent of the rights which he acquires by the subrogation? He pays as surety. It is well settled, that the surety who pays for his principal, is entitled to an indemnity only. He can recover what he has paid, and no more. In no case, can he speculate on his principal. If, therefore, he has paid the debt in a depreciated currency, he can only recover the specie value of what he gave in payment.

Such is the law, as to the rights acquired by subrogation, in every case. In 7 Toullier, 199, it is said, that "subrogation is founded on the grand principle, that it operates to no person's prejudice, or, at least, that it does not affect the condition of the debtor, and his other creditors. So far as they are concerned, it is necessary that things remain, after the payment, in the same state in which they were previously." It follows, that no person can acquire by subrogation, whether legal or conventional, the right to be paid in a more valuable currency, than the party to whose rights he succeeds, was entitled to demand, and in which he made payment himself.

On this subject, see a decision exactly in point, reported in Sirey, 1808, vol. 2, p. 154. *Case of M. de Talleyrand Périgord*. See also, Merlin, Questions de Droit, vol. 14, (Brussels ed.) page 387. *Verbo, Subrogation de Personne*.

Benjamin, for the defendants.

MARTIN, J.* This case presents two questions of law :

First. Whether an endorser who pays a bill of exchange before maturity, acquires a legal subrogation?

Second. Whether, if he has not paid the full amount of the bill, or if he has paid it in depreciated notes, he may require from the acceptor, more than he has paid, or more than the value of the depreciated notes?

The plaintiffs are appellants from a judgment, by which the defendants have recovered, in reconvention, the whole amount of a bill of exchange accepted by them, discounted in Bank, and, before maturity, paid by the endorser, or his agents, the defendants.

*BULLARD, J. was absent, by leave of the Court.

The appellants' counsel has relied on the case of *Holland v. Peirce*, 2 Mart. N. S. 499, in which this court held, that the maker of a note was discharged by the payment of it by an endorser, a short time before the closing of the bank, on the day of maturity. The plaintiff's counsel, in that case, did not urge the legal subrogation his client obtained by the payment, nor was the right of subrogation attended to by the court. The defendant's counsel, in that case, was an able and experienced one. When a case is argued by persons of that character, this court often contents itself with noticing the defence they make, without losing much time in seeking whether there are not other points than those raised, on which a different judgment ought to be given. We did so in that case. It is contended, that the payment by an endorser, before maturity, gives him no legal subrogation, because, till then, demand, protest and notice, he is not *bound*. Our Civil Code treats of the different kinds of obligations, and among them, of conditional ones. These are, therefore, obligations known to the law. They are susceptible of being released, transferred, and of passing to heirs before maturity. But the counsel for the plaintiffs urges, that the obligation of an endorser and a surety are conditional obligations, which the law classes among obligations contracted on a suspensive condition, because they depend on a future and uncertain event, or on an event which has actually taken place without its being yet known to the parties; that in the former case, it cannot be executed till after the event; in the latter, it has its effect from the day on which it was contracted, but it cannot be enforced until the event be known, Civil Code, art. 2038; that the declaration, in the second case, that the obligation has its effect from the day it is contracted, is an affirmative pregnant with a negative; that, in the first case, the obligation has not its effect in the same manner. It is true, the obligation of an endorser, or a surety, cannot be executed, until after the event on which it becomes absolute. It, however, exists, for it may be the object of a compromise, or transaction. The rights of the endorser, or surety, against the maker or principal, exist, however, before the obligation of the former becomes absolute. The Code provides, that "an obligation may be discharged by any person concerned in it, such as a co-obligor or a security," art. 2130. It is clear, from the

words used by the Legislator, that he recognized the right of paying before the obligation of the co-obligor or surety became absolute; for then, the obligation is something more than one in which the co-obligor or surety are concerned—it is their own. There was no necessity of our being informed that one *may* pay his own obligation. The co-obligor spoken of in the above article must be a conditional one; for, if his obligation was absolute, it would be equally useless to tell us he *may* discharge it. There is an evident error of the press in this article, the word *co-obligee*, being used instead of *co-obligor*, as the sense, and the corresponding article in the French text, manifestly show. The Code places the endorser and the surety on the same line; both are conditional obligors, of the creditor of the maker and principal, and at the same time, conditional creditors of the latter. The Code, in the paragraph before us, impliedly, but virtually says, that the payment by a co-obligor, surety, or any person, like them, concerned in the obligation, acquires a legal subrogation, for it immediately after informs us, that payment by a person, no way concerned in the obligation, does not give rise to subrogation. The endorser and surety being, as we have seen, conditional creditors, may perform all acts conservatory of their respective rights, before their own obligation has become absolute, Civil Code, art. 2037. Although the obligation of the conditional debtor, by endorsement, has no effect against him, until he becomes an absolute one, and no conservatory acts can till then be exercised against him, he has, however, rights which he may exercise, as that of paying the debt, and resorting to conservatory measures. Indeed, payment may be for him a conservatory measure, for it may enable him to arrest the person, or property of the maker in another State. He may secure himself by selling the note or bill, to a debtor of the maker or acceptor, who may avail himself of it by a plea of compensation or reconvention. Although the endorser be not expressly named in the Code, in the parts of it which speaks of legal subrogation, payment, or cautionary measures, which I have quoted, I think that he is included in art. 2157, No. 3, as a person bound with, or for the maker or acceptor; for the obligations the Code speaks of, are all obligations—whether absolute, conditional, several, joint and several, divisible, or indi-

Wiggin and another v. Flower and another.

visible, without any exceptions; and that he is also included in art. 2130, which speaks of any person concerned in the obligation, such as a co-obligor or surety, who are only named *exempli gratia*.

I conclude, that a legal subrogation results from the payment before maturity, of a bill of exchange, or note, by the endorser.

II. As to the second question, to wit, whether the party thus subrogated may require of the acceptor or maker, more than he has actually paid? The counsel for the appellants contends, that the first Judge erred, in condemning them to pay the whole amount of the bill, instead of reducing the endorser's pretensions to the value of the depreciated notes he gave in payment. He has referred us to a number of French authorities, which establish that the surety can claim nothing but indemnification. This is certainly true, and there was no necessity for his crossing the Atlantic to seek the means of establishing his proposition. *Nolté et al. v. Their Creditors*, 7 Mart. N. S. 9. He has invoked Toullier, vol. 7, p. 199, who says that, "subrogation is founded on the grand principle, that it operates to no person's prejudice, or, at least, that it does not affect the condition of the debtor and his other creditors. So far as these are concerned, it is necessary that things remain after the payment, in the same state in which they were previously." The rights of a surety, subrogated to those of a creditor, whether the payment has been made before the surety's obligation became absolute or after, result from the original contract between him and the principal, and are restrained by it. Those of the endorser, in the same situation, are under no restraint from his original contract with the maker, or acceptor, to wit, that the whole amount of the bill should be paid to him, or his order. The plaintiffs, by the defendants' discount of the bill, the subsequent stoppage of specie payment by the Bank, and the consequent depreciation of its notes, did not acquire *ipsis factis* any more than an inchoate and incomplete right to pay in its depreciated notes, for they were not parties to any act, or contract, from which this right might result, and no obligation or right can result to any one from an act, or contract to which he was not a party, until he manifests his intention to avail himself of such a right. *Invito beneficium non datur*. Pothier on Obligations.

Wiggin and another v. Flower and another.

Thus, if my vendee, selling the estate, binds his vendee to pay to me the price which remains unpaid, no absolute right will accrue to me, until I accept the obligation the last vendee incurred ; and, at any time before this acceptance, the parties to the second sale may cancel it, and also my inchoate right. The plaintiffs having never manifested any intention to avail themselves of the advantage which the depreciation of the Bank notes offered, until, by the payment of the note, the defendants acquired the right of the Bank thereto, were exactly in the same situation as they would have been, if, at any time after the discount, the Bank had transferred the note. In the case of *Nolté et al. v. Their Creditors*, above cited, the accommodation endorser, who was bound with, and for the insolvents, and, as such, had been subrogated to the rights of the holder of the bill by payment, was restrained in his recovery from the syndics, to the sum which he had actually paid to the holder, because his original contract with the insolvents was only to indemnify him from the consequences of his endorsement. In the case before us, the plaintiffs, by their acceptance, bound themselves to pay to the order of the payee, the whole amount of the bill ; the endorser became entitled thereto by the transfer of the bill ; the Bank acquired his right by the discount ; and the defendants, a legal subrogation to the rights of the Bank, by the payment of the bill. It is not pretended, that the defendants were accommodation endorsers. If they were, the plaintiffs might rightly invoke the law, which restrains the claim of a surety to a full, but bare indemnification. Ordinary endorsers are not placed, in this respect, on the same line as sureties, neither can they, like the latter, claim the benefit of discussion.

Upon the whole, though on different grounds than those which have led the Commercial Court to the conclusion it has arrived at, I am of opinion that its judgment should be affirmed, with costs.

MORPHY, J. I concur in the opinion delivered by Judge Martin.

SIMON, J. I concur also in opinion with Judge Martin.

GARLAND, J., *dissenting*. A. L. Gaines & Brother, held an accepted bill of the plaintiffs. Sometime before its maturity, the holders endorsed it, and had it discounted in the Union Bank of Louisiana. About a month before the bill was due, the Bank having then suspended specie payments, and their notes being at

Wiggin and another v. Flower and another.

a heavy discount, the endorsers went to the Bank, and took up the bill with its depreciated notes, and then placed it in the hands of the defendants, as their agents, who deposited it in the Bank of Louisiana, where specie was demanded for it. The clerk to whom the note was paid says, it was understood, "that the payment was made by, or for account of the acceptors, though no inquiry was made on the part of the Bank." He further says, that the bill could not have been obtained except by a payment, as the Bank never transferred or negotiated the notes or bills it held.

The plaintiffs contend, that this was a payment made for their benefit, and that the bill has been discharged, and they sue to have it surrendered to them. The defendants deny, that the payment was for the use of the plaintiffs, and by a demand in reconvention, claim judgment for the amount of the bill. The defendants had a judgment on their demand in reconvention, and the plaintiffs have appealed. The reason given by Gaines & Brother, for taking up the draft was, that they were about to leave the city for the summer, and did not wish to have their endorsements out in their absence, and that it was not to speculate by paying the draft in depreciated notes, that they paid it. They have not shown, that the credit of the plaintiffs was at all doubtful, or that there was the slightest probability of the bill's being dishonored; on the contrary, they placed it in the hands of their agents, relying upon its payment to meet engagements of their own.

When I first examined this case, I thought it a stronger one for the plaintiffs, than that of *Holland v. Peirce*, 2 Mart. N. S. 499. Subsequent reflection has satisfied me of the correctness of my first impressions. In that case, which was a payment made by an endorser before maturity, but within the last hour previous to a protest, the court said, that the payment enured to the benefit of the maker, and that no matter from what motives it was made, the note could not afterwards be protested. In that case it was held, that the plaintiff could not recover, and in this, I do not see how the plaintiffs in reconvention can be entitled to a judgment, unless the decision in *Holland v. Peirce*, be overruled. The most favorable point of view in which I can put this

case for Gaines & Brother, is, that they, in taking up the bill at the Bank, acted as the agents of the plaintiffs, and that they are entitled to indemnity from them, that is, for the value of what they paid. But if they contend, that they paid the bill, in my opinion they cannot recover at all. The simple inquiry is, was the bill paid, or was it purchased. That it was not purchased, is clearly established by the evidence of the Clerk of the Union Bank, who says, that it was not the intention to negotiate or transfer the bill, and that had he not supposed the payment was made for, and on account of the acceptors, it would not have been given up. Had it been intended to sell the bill, the assent of the Bank was necessary, and that assent could not be given by the Clerk who received the payment. I, therefore, take it for granted that it was a payment, and being so, the obligation was discharged: what obligation the payment created between the parties afterwards, is another question.

Chitty tells us, that payment may be made by any one for the honor of the drawer, or any of the endorsers; but that it is always made after protest, and that no person should pay in honor of another, before the bill has been protested. The simple reason is, that neither the credit nor honor of any person is at stake, until there is a protest. Pothier, *Traité du Contrat de Change*, No. 114, says: "*Celui qui acquitte une lettre de change pour l'honneur du tireur, ou de quelqu'un des endosseurs, doit, pour obliger envers lui, actione negotiorum gestorum, celui pour l'honneur de qui il l'acquitte, la laisser protester par le porteur avant que de la payer.*" These principles are, I believe, recognized by every writer on bills of exchange.

I am perfectly aware, that there are a great variety of obligations, in which parties may be bound in different modes; but I do not understand the responsibility of an endorser, previous to protest, as being similar to that of a co-obligor or security. The latter are directly bound; the former only contingently; and he may never be, if he lets the acceptor of a bill or the drawer of the note alone to pay it. A security has no right to recover from his principal more than he pays, nor can he make the obligation more onerous than it was in the hands of the creditor. Such, I understand, to be the law, as relates to co-obligors also.

The 2130th article, of the Civil Code, says, that "an obligation may be discharged by any person connected in it, such as a co-obligor or a security." At the time when the payment was made in this case, what interest or concern had Gaines & Brother in the bill? They had parted with their ownership of it by having it discounted. Their names were on it to be sure; but they were not bound for its amount in any way, until after maturity and protest, and this last event might never occur.

The plaintiffs in reconvention contend, that under article 2157, of the Civil Code, they are subrogated, of right, to all the rights of the Union Bank against Wiggin & Davenport. That article says, that "subrogation takes place of right for the benefit of him who, being bound with others, or for others, for the payment of the debt, had an interest in discharging it." The mere fact of the name of Gaines & Brother being on the bill, did not, in my opinion, create an interest previous to maturity. They were in no manner responsible. They could not be sued, or called on to give security for the amount of the bill; nor had the Bank a right to take any step towards them. If there was any other interest, than that arising from the endorsement, it ought to have been shown by testimony, which has not been offered. I give no credit to the reason stated for paying the bill. I have no doubt it was a speculation, and being such, I cannot give it my assent. This court have said, that an accommodation endorser cannot recover more of the drawer than he actually pays. He is entitled to indemnity only. 7 Mart. N. S. 12, 499. I now ask, what would be said of such an endorser, who, if the note his name was on was held by one of those banks whose notes are at a heavy discount, should go into the market, and purchase them, and a day or two before the maturity of the note pay it, and then claim the full amount from his principal? I do not believe any court would give him a judgment under such circumstances; yet the accommodation endorser has as much interest in discharging the note as any other endorser, and towards the Bank, or the holder of the note or bill, stands precisely in the same situation.

The most equitable and lenient view I can take of this case is, that the judgment should be reversed, and the case remanded, for the purpose of ascertaining what was the actual depreciation of

McNairy and others, Executors, v. Bell.

the notes in which the bill was paid, and of allowing the reconvenors the value of them.

Judgment affirmed.

NATHANIEL A. McNAIRY and others, Executors of John McNairy, deceased, v. ROBERT BELL.

A judgment rendered in another State against a defendant not a resident of that State, is not admissible in evidence against him, unless it be shown, that he was cited, or had appeared. Without service of citation, or appearance, a judgment is, *per se*, of no effect.

The statute of the State of Tennessee, authorizing sureties who have paid the debt of their principal, to obtain judgment against the latter, by motion, without notice to him, and on the verdict of a jury convened to try the fact of suretyship, can only operate, within that State, on citizens or residents thereof. It cannot empower citizens of that State to obtain judgments against non-residents.

To give to a court, in any case, jurisdiction of the person, the party must have had due notice of the suit.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*
 MORPHY, J. This suit is brought on an open account annexed to, and made part of the plaintiffs' petition, to recover \$25,611 88, for slaves sold and delivered to the defendant, by the late John McNairy, and for cash at sundry times paid by the latter, for the account, and at the request of the former, from the year 1823 to the year 1831. The defendant admitted, that the said John McNairy was liable, with others, as surety for himself and George Bell, his brother, for a certain debt, (amount not recollected) due to one John G. Meaux; but averred, that in March, 1829, he remitted to the said John McNairy \$9000, to pay said debt, and denied being indebted to the estate of the deceased, in any sum whatever, except in the items of \$75 and \$100, advanced to his wife in the year 1831, which sums he averred, that he had always been willing, and ready to pay. The defendant further relied upon the plea of prescription. The Judge below rejected all the items of the account except one for \$4071 86, for which, to-

judice. To give jurisdiction of the person to a court, in any case, the party must have had due notice of the suit. We cannot believe ourselves bound to enforce against our citizens, or to consider binding on them, a judgment obtained under such a law, which is derogatory to the first principles of justice. In reference to this same statute, this court has already had occasion to recognize the well settled doctrine, that a judgment rendered in another State is not evidence against a defendant, unless it be shown, that he had been served with process, or had otherwise appeared. Without such service, or appearance, a judgment or decree is, *per se*, of no effect. 10 La. 222, 381. 13 Johnson, 192, 205, *et seq.* 1 Kent's Comment. 261, and *note.* But, upon examining the record, we think, that independent of this evidence, it sustains the judgment appealed from. The debt for which the defendant in his answer acknowledges, that John McNairy was his surety with others, appears to have been evidenced by two notes of \$5150 each, in favor of one Meaux, who had a judgment entered on one of them, and assigned the other to Montgomery Bell, who obtained thereon the judgment, the amount of which is charged as having been paid by the plaintiffs' testator, on the 9th of June, 1831. These judgments are frequently mentioned in a long correspondence, which passed between McNairy and the defendant, and the latter's liability to the former for Bell's judgment clearly admitted. In a letter of the 29th of November, 1829, the defendant says: "You must, without delay, send me the two judgments on account of the claims of old Meaux; one of them, I believe, in favor of Montgomery Bell;" &c. On the 7th of July, 1830, he says: "I want you to have something authentic sent me, to show, that those two judgments sent me, that is, *Richard Meaux v. John McNairy and others*, and *Montgomery Bell v. John McNairy and others*, are also against G. and R. Bell, as founded on a debt of theirs, for which you are security. As they stand here, from the judgments sent it does not appear, that G. and R. Bell are concerned. I also want you to have the one of *Richard Meaux*, against *John McNairy* and others, the interest of the judgment made over to me, R. Bell, alone, so that I can use it. If judgment yet has been got on the other let me know it, and the amount, if not got when it will. I

McKee v. Dubois.

must make arrangements to pay it as soon as I possibly can." On the 15th of May, 1831, he writes; "Yours of February, would have been answered long since, but I have been waiting and trying to raise the amount of Montgomery Bell's judgment to send you, and now find it will be out of my power to do it this spring;" &c. On the 26th of July, 1831, he says: "I now hasten to thank you for paying this judgment of four thousand dollars and upwards to Bell, which, as I told you, was out of my power to do myself, but trust I will have it in my power to re-pay your kindness next spring." In several other letters, the defendant reiterates the acknowledgment of his indebtedness to his brother in-law, and frequently expresses his desire, and, at the same time, his inability, to re-pay this money. These admissions, one of which mentions an indebtedness approaching so nearly to the charge made in the account, appear to us sufficiently to establish its correctness. They have moreover been made within ten years previous to the institution of this suit, which was brought on the 3d of April, 1840.

It is, therefore, ordered and decreed, that the judgment of the Commercial Court be affirmed with costs, to be paid in due course of administration by the legal representative of the estate, said Bell having died during the pendency of the appeal, and the action having been revived.

Peyton and I. W. Smith, for the plaintiffs.

C. M. Conrad, for the appellant.

JOHN MCKEE v. OLIVER DUBOIS.

Proof of written notice to the endorser of a note of its non-payment by the makers, and of protest, is necessary to a recovery against him.

APPEAL from the District Court of the First District, *Buchanan, J.*

MARTIN, J. The defendant is appellant from a judgment against him as endorser, after judgment by default, taken for want

of an answer, and confirmed. His counsel has contended that the First Judge erred, as no evidence was produced of due notice to the defendant, of the dishonor of the notes. The counsel of the appellee has contended, that the evidence of the notice results from the certificate of the Notary, who attests that, at the request of the makers, on their refusal to pay, he called on the appellant, presented him the notes, and demanded payment, and was answered that they would not be paid. Evidence being given of the appellant's having secreted his property, in fraud of his creditors, he was condemned to imprisonment for three years, unless he sooner paid the judgment. The appellant's counsel has replied, that the appellee having procured the imprisonment of his client, he must show that he has complied with the requisites of the law. The evidence of notice does not otherwise result, than from the implication drawn from the Notary's demand of payment from the endorser, when he informed him that he had in vain called on the makers, while the endorser was entitled to a *written* notice of non-payment and protest. The call on him was before the protest, for it is stated therein. Civil Code, art. 3522, No. 23.

It is clear that the court erred.

The appellee's counsel has endeavored to cure this defect by the production of the notices, which he filed in the District court at a period which does not appear. But it must have been posterior to the close of the transcript in the first court, since it was filed in this, on the 22d of April, 1843, and the certificate of the clerk below, attesting the correctness of the copies of the original notices, bears date the 1st of July, following, and the counsel has admitted in argument, that they were not produced on the trial. In a case in which the appellee has sent the appellant to jail for three years, he cannot complain that the counsel of the latter seeks the liberation of his client, by showing that the proceedings which have terminated in his confinement, have not been regularly conducted.

It is, therefore, ordered and decreed, that the judgment be annulled and reversed, and the case remanded for a new trial, the appellee paying the costs of the appeal.

McHenry, for the plaintiff.

Roselius, for the appellant.

Bell v. The Western Marine and Fire Insurance Company.

JAMES G. BELL v. THE WESTERN MARINE AND FIRE INSURANCE COMPANY.

Where a witness cannot be benefited by a decision, be it either way, no objection can be made to the admission of his testimony.

The contract of assurance must always be made in writing. The terms of the contract must be sufficiently expressed, every necessary stipulation being inserted.

The policy is the contract between the parties, and, as a general rule, all proposals or conversations prior to the subscription, are considered as waived, if not inserted in the policy, or in a memorandum annexed to it. Correspondence, or other communications cannot be referred to, unless to explain some ambiguity, or to sustain an allegation of error or fraud, or some fact that would have affected the risk.

Parol evidence is admissible to establish the truth or falsehood of a representation made to obtain a policy, or to show who is included in a policy made *for the benefit of whom it may concern*. But where a party is expressly named, and his interest specified, or legally understood or presumed, the policy cannot be changed or altered by parol evidence, unless on an allegation of fraud, error, or other legal cause.

Policies of insurance are to be construed like any other written contract, in which the intention of the parties must be sought in the instrument itself. Plain mistakes, and frauds, may be corrected.

All losses or risks may be insured against, except such as are forbidden by public policy, or positive prohibition, or those occasioned by the misconduct or fraud of the insured.

It is essential to the contract of insurance, that there should be an interest at risk; but not that the thing insured should have what is properly called a value, or price, or be assignable.

Policies may be effected on a future interest, but the interest must subsist at the time of the loss, to give rise to a claim for indemnity.

A mortgagee, or creditor having a lien on property, has an insurable interest. It makes no difference that a superior lien exist in favor of another, if anything remains for the insured. A lien, which is invalid, will not create an insurable interest; but it is sufficient, if it can be enforced between the contracting parties. Thus the interest of the mortgagee in an unrecorded mortgage, is an insurable one, though the mortgage would be without effect as to third persons.

The interest of the party by whom property is held as security, is an insurable one. Hence the right of agents, consignees and factors, to insure the goods of their principals.

Where the policy on a steamer, obtained by the owner, does not prohibit him from selling, he can do so without forfeiting it, if the insurers are not thereby put in a worse situation; and where he retains a mortgage, or a privilege thereon as vendor, he will have an insurable interest, and may recover on the policy. It is not necessary that the interest at the time of the loss, should be the same as that existing when the policy was obtained.

The vendor of a steamer, or other vessel has a privilege on the thing sold, in the same manner as the vendor of other property. C. C. 3304, sec. 8.

Bell v. The Western Marine and Fire Insurance Company.

A general description of the thing insured is sufficient. One owning but a part of a ship, or of a quantity of goods, or a mortgagee may insure generally, without specifying his interest.

An application for insurance *for whoever it may concern*, is sufficient notice to put the insurers on their guard, and to throw upon them the obligation of inquiring further, if other information be desired.

A deviation is the increasing, or varying of the risk insured against without necessity, or reasonable cause.

Where a boat, on which insurance had been effected by an owner or vendor retaining a privilege, is removed to the opposite side of the river by the Marshal of a court in which she had been libelled, and there kept by him, there being no proof that the risk was at all increased, it will not amount to such a deviation as to forfeit the policy; nor will it be forfeited by the fact that she had not a captain and crew on board when so laid up. When on a voyage, or in a port receiving or discharging cargo, a boat should be properly manned and officered; but it is neither usual, nor necessary, when laid up.

APPEAL from the Commercial Court of New Orleans, *Watts, J.* The facts on which this controversy turns, will be found at length in the opinion delivered by GARLAND, J., in the case referred to by the court, when this case was before it on a former appeal. See 3 Robinson, 428. A judgment rendered by the lower court, in favor of the plaintiff, having been reversed, this case was remanded for a new trial, the court declaring, that there were "circumstances in it which induced a strong suspicion, that the defendants knew that there was an agreement to sell the boat to Northam, and that a contingent interest was really intended to be insured, although Bell's legal title was not technically divested; but that these circumstances were not sufficiently shown to justify an affirmance of the judgment."

On the second trial, Lawrason, the Secretary of the Western Marine and Fire Insurance Company, was examined on behalf of the defendants. He testified that he was in the employment of the defendants at the time of the execution of the policy sued on, as a recording clerk; that it is the invariable practice of the President of the Company, to inquire of all applicants for insurance on steamers, as to the nature of the interest to be insured; that he is more particular with regard to steamboats, than any other description of property; that he always causes the nature of such interest to be recorded in the books of the office; that he, witness, recorded in the office books, the policy in this case; that the

Bell v. The Western Marine and Fire Insurance Company.

record was correctly made; that he does not doubt, if the plaintiff had stated to the President of the Company, that his interest in the steamer was but that of a creditor, the character of that interest would have been clearly stated in the policy of insurance, and have been so entered on the books of the office; that he, the witness, has made out many policies for the defendants, and his practice has always been to state distinctly the character of the interest insured, and this he has done under the orders of the President; that the reason why he is more particular with regard to insurance on steamboats is, that the risk is heavier and the contracts longer; that the business of the office is very great, and the President trusts nothing to his memory, but states everything in the policy; that the office has effected insurance for parties interested in steamers, but the character of the interest is, in all cases, expressly stated. On his cross-examination, this witness stated, that he thinks he must have been present when Bell made his application, but that he does not recollect him, and that he has no recollection of any conversation between him and the President of the Company.

The plaintiff offered in evidence the testimony of one Northam, taken under a commission, which was objected to by the defendants, and rejected on the ground of interest. This witness stated that, in August, 1839, he agreed to purchase from the plaintiff, the steamer Bayou Sara, for \$18,000, payable in three instalments, to wit: the first note for \$8,000, dated 1st September, 1839, payable six months after date; the second and third notes for \$5,000 each, of the same date, payable one at twelve, and the other at eighteen months after date. That two of the notes were endorsed. That he was, at first, sole owner of the steamer, but afterwards sold one sixth to L. E. Hooper. That he received a notarial act of sale of the boat; that the notes were identified with the act of sale, and were dated the 1st September, 1839, from which day, he agreed to receive the boat, and to become liable for the wages of the officers and crew. That after giving the necessary information to the notary for the preparation of the bill of sale, plaintiff and himself went to the office of the defendants, where he does not recollect seeing more than one person, whom the plaintiff addressed as Mr. Matthews. To the best of wit-

Bell v. The Western Marine and Fire Insurance Company.

ness' knowledge and recollection, plaintiff stated to Mr. Matthews, that he had sold the steamer Bayou Sara, and wished to get her insured. That there were other words spoken in conversation with regard to the sale and insurance of the boat, which he does not recollect. He thinks Mr. Matthews observed—*make your application*; which he believes plaintiff did, in writing. That from the office of the defendants, witness and plaintiff went to that of the Firemen's Insurance Company, where, he is under the impression, that two or three persons were present, with whom, plaintiff appeared to be acquainted; and to the best of witness' recollection, plaintiff made the same, or a similar statement to the one he had just made to the defendants. That plaintiff and himself, met at the office of the Notary the next day, (September 6th,) and signed the bill of sale.

In answer to the interrogatories propounded by the defendants, Northam stated: that he does not recollect of any person's accompanying the plaintiff and himself, to either of the Insurance Offices; that they visited those offices on the 5th of September, 1839. That his object in accompanying the plaintiff was to see, that the insurance was effected on the boat, he having agreed to pay the premium, and having promised his endorsers that the boat should be insured, and kept so until she was paid for. That he kept no memorandum of the conversations in the Insurance Offices, but does not doubt that he heard all that passed. That they were in each Office from five to ten minutes, as near as he can recollect; that he remained all the time with plaintiff in defendants' office, and thinks that he did so, also, in the Firemen's office. That Bell stated his interest as above described, in his conversations with the officers of the two offices. That he did not read plaintiff's written application, and, consequently, cannot say what was stated therein. That he can speak with confidence as to the correctness of the statements here made. That he thinks plaintiff made a written application to each office, while they were in said offices. That he had recently conversed with the plaintiff, in regard to the interrogatories that would be propounded to him in this suit. In answer to a question as to whether he expected to gain or loose any thing by the result of this suit, he stated that his pecuniary embarrassments were such, that he does

Bell v. The Western Marine and Fire Insurance Company.

not know whether the decision of the case either way, can affect his interest.

It was agreed between the parties, that the plaintiff should sue for, and, if possible, collect the amount of the notes received by him for the price of the steamer, without prejudice to the rights of either party; that, in the event of the judgment being affirmed in favor of the plaintiff, any amount received by him on account of the notes, should be credited to the defendants, they paying all reasonable costs and expenses, incurred by him in prosecuting the parties to the notes. The written abandonment by the plaintiff, and his claim for a total loss, was introduced in evidence.

There was a judgment below in favor of the plaintiff, for the amount of the policy, with interest at five per cent. from judicial demand. The defendants appealed.

C. M. Jones and L. Peirce, for the plaintiff. This case was remanded to enable the plaintiff, if in his power, to show, that at the time of effecting the insurance, the defendants were aware, that Bell was not insuring as owner.

In order to prove this fact, the testimony of Northam, who bought the boat from Bell, has been taken. It proves conclusively, that the insurers were aware, previous to the insurance, of the interest of the plaintiff. This testimony was objected to on the grounds: 1st. That Northam was interested. 2d. That no parol evidence of conversations previous to the written application and the policy, could be given.

As to the first point, that Northam is interested. It is evident, that his interest, if he have any at all, is equal. If the plaintiff succeeds he is liable to the defendants, and *vice versa*. In any event, he is bound to pay to one of the parties the amount of his notes.

The court below decided, that Northam was interested because he was bound to pay the premium. The words of Northam are: "My object in accompanying Bell to the Insurance Companies was to see, that insurance was effected, having agreed to pay the premium, and having also promised my endorsers, that the boat should be kept insured until she was paid for." From this it may be inferred, that it was the belief of Northam and his endorsers, that if the boat was lost, and the insurance paid, they

were released from all obligation ; but this is not so. See the decision of the Supreme Court in the cases, 3 Robinson, 428, and 16 Peters, 495. Even supposing, that Northam thought himself interested in the event of the suit, if he really were not so in law, he is competent. See, *Commercial Bank of Albany v. Hughes*, 17 Wendell, 94, and *Stall v. Catskill Bank*, 18 Wendell, 466. But the Judge of the lower court says, that because Northam agreed to pay the premium, he is interested. But with whom did he agree to pay the premium ? It was with Bell. He had bound himself to pay \$18,000, for the boat ; but Bell, distrusting the solvency of Northam and his endorsers, and fearing, that if the boat was lost the notes would not be paid, required that Northam should pay to the Insurance Companies the amount of the premium necessary for the insurance of the payment of the notes, (the insurance being for the benefit, and on account of the interest of Bell) ; and this was the only way that Bell could receive the amount of the purchase money, for if he had paid the insurance premium himself, instead of receiving \$18,000, he would only have received \$16,200. The second objection to Northam's testimony is, that no parol evidence can be received, to alter, vary, or add to a written contract. Of this there is no doubt. But the question is, whether the evidence of Northam has any one of these effects.

The decision of the Supreme Court, in this case, settled the point. It was remanded for the purpose of allowing the plaintiff to show, that the Insurance Company was aware of his interest, the court believing, from the circumstances, that they had that knowledge. Now how was this fact to be proved, except by parol ; and it is, on the part of the Insurance Company, any thing but fair dealing to attempt to defeat a claim supported by evidence, which they have not in any manner impeached. But does the testimony add to, alter, or vary the policy of insurance ? The insurance was effected by Bell, *on account of whom it may concern*. These words, would cover the interest of any person in the boat for whose benefit the insurance was effected, and parol evidence has always been admitted to show, what that interest was, although the insurer was not informed thereof. We,

Bell v. The Western Marine and Fire Insurance Company.

therefore, say that in accordance with the former decision in this case, the judgment of the court below must be affirmed.

In the case of *Dumas v. Jones*, 4 Mass. Rep. 647, the court decided, that where a party insured in his own name, he could only recover as far as he proved himself owner; but in 6 Mass. Rep. 216, in the case of *Lee et al. v. The Massachusetts Marine and Fire Ins. Co.*, they say: "Where a party insures on account of whom it may concern, it will cover the interest of any person as far as the contract may be found to have been authorized by mercantile usage, thus comprising the cases of consignees, factors, trustees, agents, and persons having a qualified interest in the property insured; and courts of law are liberal in the construction of such contracts." See also Phillips on Ins. edition of 1823, page 60. So, if a factor has made advances on goods consigned to him, for the payment of which he has an interest in the goods, an insurance in his own name, on account of whom it may concern, will cover that interest. In page 61 of Phillips (same edition), after citing numerous authorities, the author says: "From these cases it seems, that a policy of this description may enure for the benefit of the person effecting it, or to that of any other person whom he intends, or who requested him to effect it, or adopted it when made." Now, according to the doctrine above established, Bell must recover in whatever aspect the case may be viewed.

Was the application of Bell sufficient notification to the insurers, that other interests, except that of the owner, were intended to be covered? If the doctrine laid down in 6 Mass. Rep. 216, be correct it certainly was, for no person, (much less an Insurance Company,) is presumed to be ignorant of the law; and if an insurance, "on account of whom it may concern," would cover any person proving a qualified interest in the property, they are presumed to have known such to be the law. If they wish to know the interest, they are bound to inquire. If they do not, it is their own fault, and they must pay the insurance. See 1 Phillips on Ins. 242, 152, 299.

So that whether the insurance had been for Bell as vendor, and as a mortgage and privileged creditor, or for Bell on ac-

Bell v. The Western Marine and Fire Insurance Company.

count of the debtor, Northam, the policy of insurance is full and sufficient.

Maybin, for the defendants. The court, in their opinion already delivered in this case, has settled two points: 1st. That Bell was the owner of the Bayou Sara at the time of effecting the policy of insurance, September the 5th, 1839, he having only agreed to sell her to Northam; and 2d. That Bell had no right to change the character of his interest between the time of the insurance and loss, without the assent of the defendants. Their opinion on these two points will aid in disposing of this case. The court, thinking that, from some circumstances in the case, the defendants knew of the agreement to sell the boat, and that a contingent interest only was intended to be insured, ordered the cause to be remanded, to enable the plaintiff to show this knowledge on the part of the defendants. For this purpose the testimony of Northam, the purchaser, was offered, and objected to, because:

First. He was interested, and therefore not competent. He had agreed to assume the liabilities of the boat, for wages of officers, crew, &c., from September 1st, 1839, and he had promised to pay the premium, and also promised his endorsers on the notes given by him for the purchase of the boat, to insure her, and to keep her insured, till she was paid for.

Second. The evidence tended to contradict the application for insurance and the policy. That this cannot be done is well settled; for, "whatever proposals are made, or conversations held prior to the subscription of the policy, are to be considered as waived, if not inserted in the policy, or in a memorandum annexed to it." 13 Mass. Rep. 96. The law, on this point, is well stated in 1 Phillips on Insurance, 23 to 29, edition 1840. The application and the policy are for insurance on the steam boat Bayou Sara, her body, tackle, apparel, and furniture. On these was the insurance effected. The testimony offered is to show, that the insurance was to cover a contingent interest, to the knowledge of the insurer. No error or fraud in the policy is alleged. It was on this principle, that this court, in *Lippincott v. Louisiana State Ins. Co.*, 2 La. 400, rejected even the application for insurance, when offered to explain or contradict

Bell v. The Western Marine and Fire Insurance Company.

the policy. Lord Mansfield held, that the policy is conclusive proof of the intention of the parties; and he would not permit the slip to be introduced to show, what kind of policy the parties intended to make. Douglass, 12 note. See 1 Phillips, 43 to 54.

But, even if admitted, the testimony of Northam does not establish the fact of knowledge in the defendants. The utmost which he states is, that Bell, in his presence, told Mr. Matthews, that "he had sold the Bayou Sara, and that he wished to get her insured." On his cross-examination he observes, that Bell stated his interest as described by Northam in the conversations of Bell with the Insurance officers. But the character, the nature, the extent of Bell's interest, Northam does not allege that Bell communicated to Mr. Matthews—Whether it was absolute, or contingent; as owner, or as creditor. Mr. Matthews, not willing to leave a matter so important to uncertainty, told Bell to put the application in writing, which Bell did. What was it but an application to insure the boat, her hull, tackle, apparel, and furniture. Mr. Matthews naturally concluded, that he was the legal owner of the boat, and in this opinion this court has said, that he was right.

Northam admits, that he has recently had conversations with the plaintiff, in relation to this suit. How much of his impressions he may have received from the conversations we do not know. But the evidence of Lawrason, the secretary of the defendants, goes far to weaken that of Northam. He distinctly states, that Matthews trusts nothing to his memory, in consequence of the great business operations of the office; that it is his invariable practice to make inquiries of applicants for insurance, concerning the nature and character of their interest; that he is more particular with insurers on steam-boats; that the nature, and character of the interest insured, are always recorded in the books of the office; that in this very case, the witness himself recorded in the books, this policy; that he has no doubt, that if Bell had stated to Mr. Matthews, that his interest in the Bayou Sara, was only that of a creditor, it would have been so stated in the policy, and so recorded in the books of the office; that he has always, under the orders of Mr. Matthews, distinctly

Bell v. The Western Marine and Fire Insurance Company.

stated the character of the interest insured; and that insurances have been effected in the office of the defendants for persons who had liens on steamers, and that the character of their interest was stated in all the policies.

Such is the usage in that office, and the plaintiff contracted in reference to it, and under it; and when the court considers the vagueness of the testimony of Northam, and the strong and unimpeached testimony of Lawrason, they will see no proof, that the defendants knew of any contingent interest which Bell wished to insure.

The defendants, therefore, urge:—1st. That if the plaintiff had any insurable interest in the Bayou Sara, as a mortgage or privileged creditor, or had any contingent interest in her, he ought to have disclosed it to the defendants. This he was bound to do: *First*: From the usage of the office of the defendants as above stated. A party contracting with an insurance office, contracts in reference to its rules, like one contracting with a bank; and it is not necessary to show personal knowledge of the usage. 11 Wheaton, 431. 1 Peters, 25, 55.

2d. From the usage in this city, which made part of the contract. 1 Phillips, 43, 48, 51, edition 1840.

3d. From the decisions in our own country. The insurer has a right to be informed of every circumstance tending to create or increase the risk against which insurance is sought, and which, if disclosed, might induce him to decline or charge a higher premium. *Walden v. Louisiana Ins. Co.*, 12 Louisiana, 135. 2 Peters, 25. 16 Id. 495, 510.

The Judge below decided, that because the words "*for whom it may concern*" are used in the policy, the plaintiff did give notice to the defendants, not only of the character of his interest in the Bayou Sara, but also, that he was insuring for Northam, or the new owners. If such be the law, that those words are to cover any and every interest in the thing insured, the sooner our Insurance Companies know it, the better. But do the words "*whom it may concern*," support such a position? The words are technical, and are understood to mean, not any one who may have an "interest in the thing insured, but only such as are in contemplation of the contract." 1 Phillips, 152. Whom did the parties

contemplate in the contract of policy? The actions or Bell answer the question. He makes the application for insurance—he accepts the policy—he abandons after the loss—he sues for the amount of the policy, and hints at no interest but his own—alludes to no person but himself. He takes Northam to the defendants, when he applies for insurance—does not speak of him to Mr. Matthews, and holds out to Mr. Matthews, no one but himself, as the person with whom the contract was to be made. The person then in contemplation of the contract was the plaintiff only; for he did not even state to Mr. Matthews, to whom he had sold the Bayou Sara. Whom, under these circumstances, could the defendants know but the plaintiff? If Northam is to be the person insured, has not the plaintiff led the defendants into an error, as Northam was present, when Bell made the application? And has not Northam also led them into an error? No one but the plaintiff was in contemplation of the defendants.

The Judge below, in a case of much importance, pushed his construction of the words "*whom it might concern*," to an extent somewhat like that in his construction of them in the present case. The case was that of *The Alliance Marine Ins. Co. v. The Louisiana State Ins. Co.*, 8 La. 1, where the plaintiffs, who had paid to the assured the loss under their policy, called on the defendants for reimbursement, because the consignees in New Orleans, of the assured, had effected insurance with the defendants for one month on the same cotton, *for all whom it may concern*, and as one of the consignees deposed, the insurance was made without reference to any particular ownership, and expressly to secure the property against such risk, till it could be re-shipped on behalf of whoever might be interested in it, owners or underwriters, whether any part, or all was covered by marine policies in England. This was a strong case for the plaintiffs in that action, for the words seemed intended to cover every interest.

Yet this court decided against them, and held, that to render a contract of insurance valid, the mutual consent of the parties was necessary. A similar principle was maintained by Judge Washington, in 2 Washington C. C. R. 391, *Bauduy v. Union Insurance Company*, where the insured, supposing that \$3000,

had been shipped on his account, insured that sum, in his own name, for *whom it might concern*, when, in fact, only a part of that sum had been shipped on his account. The plaintiff, Bauduy, having money on board the vessel, endeavored to recover his money under the same policy with the consent of the insured. Judge Washington held, that he neither procured the insurance himself, nor authorized any one to do it, and rejected the claim. (See 4 Wendell, 75.) Thus showing, that the assent of the insurer to the party contemplated, under the words "for whom it may concern," must be obtained.

But the plaintiff contends, that under the words "whom it may concern," he himself may recover his contingent interest; because agents, factors, consignees, mortgagees, may insure the subject generally in their own names, without disclosing their interest as mortgagees, consignees, &c. This is admitted; but the reason on which this principle rests, does not apply to the case before the court. Consignees, factors, &c., are always in the possession of the property insured, and the legal title is in them, and in mortgagees for many purposes. *Conard v. Atlantic Ins. Co.*, 1 Peters' Sup. C. Rep. 337. 3 Kent, 129. 4 Id. 134. 1 Pickering, 389. But with us the possession is not vested in the mortgagee, or privileged creditor. And the legal title still remains in the mortgagor or debtor. A lender on bottomry must disclose his interest to the insurer, and in that case the debtor retains possession of the thing bottomried or hypothecated. 1 Phillips, 111, 169, 170, 194, 195, 196. By analogy, the same rule should apply to a mortgagee, who is not in possession. The reason of the principle does not, therefore, apply.

Not only is the reason on which that principle rests, not applicable to a privileged or mortgage creditor; but Bell had no such contingent interest at all, when he effected his insurance. This court has already held, that he was the owner, at the time of the insurance, of the Bayou Sara; and, therefore, he could have no contingent interest. His policy, when it insured the body, tackle, &c., of the boat, insured him, as he was in truth, the owner.

Whether a mortgagor must disclose his interest, does not appear to be entirely settled. Phillips, vol. 1, 169, seems to think that

Bell v. The Western Marine and Fire Insurance Company.

it is not necessary; but the cases referred to by him do not fully establish the principle. In 2 Caines, 19, and 1 Johns. 385, the mortgagor was in possession, bringing him within the principle as applied to a mortgagee. In 13 Mass. 61, all the facts were at the time communicated to the insurance office. In 13 Id. 101, the court did not consider the question settled. The case from Wright's Ohio Reports, was a *nisi prius* one. The position is stated in a charge to the jury, and no reason is assigned by the court, and the report of the case shows, that by consent of parties, Williams, the vendor and insured, and also the plaintiff, was left in possession of the boat. But it is not necessary to settle the point; and if it be, the cases in 2 Peters, 25 and 16 Id. 495, show the necessity of Bell's representing his interest in the boat to the defendants.

2. Bell, not being at the time of effecting the insurance, a mortgagee or privileged creditor, nor having any contingent interest at all in the Bayou Sara, he was owner, as has been already decided by this court. He could not have been a mortgage creditor, for he did not sell the boat till September the 6th, after the insurance, by which act of sale alone he could have a mortgage, if any could exist at all. He could not be a privileged creditor, for he had not sold the boat when he insured. Being then owner, on September the 6th, the day after the insurance, he sold the boat, and divested himself of his ownership, which was what he insured, and thus, changed his relations with the defendants. The interest insured must be the insurable interest at the time of the insurance, which, in this case was his ownership. 3 Kent, 257; 2 Phillips, 601 and 602; 2 Peters, 25.

This ownership he transferred, after the insurance, without the consent of the defendants, which, as this court has decided, he could not do.

3. Bell had no interest in the Bayou Sara at the time of her loss, for he was no longer owner, having by the act of September 6, 1839, sold her to Northam. He had no mortgage upon her. Such a mortgage cannot exist on a steamboat. 7 La. 487, 488. 17 Id. 159.

He had no privilege, as vendor, on the Bayou Sara at the time of her loss. She had been libelled in the United States Court for this District, and condemned, and ordered to be sold, and full and

entire possession had been taken of her by the Marshal, who kept her from February 26th, 1840, to April 19th, 1840, when she was burnt. The purchaser, Northam, therefore, lost possession of the boat, and the privilege of Bell, as vendor, consequently, ceased. Civil Code, art. 3194. The purchaser lost possession by the seizure and condemnation. 5 Martin, 268; 8 Id. N. S. 664; *Parish v. Hozey*, 17 La. 578; 2 Peters' Cond. Rep. 9; 4 Cranch Rep. 2; 10 Peters Rep. 400.

Bell took the endorsed notes and special mortgage on the boat, in payment of his privilege by the act of September 6th. There was a novation. He gave up his privilege for a conventional mortgage. 6 Mart. N. S. 636; 2 La. 111; 16 Id. 143.

The 3194th article of the Civil Code, with regard to a vendor's privilege on movables, applies to sales of all movables but vessels. They are the subject of a special article, the 3204th, paragraph 8.

The credit of 6, 12, and 18 months, given to Northam for the purchase of the Bayou Sara, is inconsistent with the continuance of the privilege of Bell. 7 Peters, 344. Privileges are matters *stricti juris*. Civil Code, art. 3152.

Being neither owner, nor mortgage nor privileged creditor on the Bayou Sara when she was burnt, Bell had no insurable interest in her, and, therefore cannot claim a loss. *M'Carty v. Com. Ins. Co.*, 17 La. 366. The insurable interest of a party to whom property is hypothecated, depends on the validity of the hypothecation. 1 Phillips, 111; 3 Mason, 255.

4. The Bayou Sara was libelled for the just debts of the boat, and was in the possession of the Marshal about seven or eight weeks, and burnt while so in his possession. The defendants are not responsible for the acts of the Marshal. The debts were contracted by the captain of the boat, or by the other agents of Bell. 1 Phillips, 591, 592; 3 Kent, 303; 1 Emerigon, 363, *et seq.*; 13 La. 516. The Bayou Sara was insured as a river boat, and for the purposes of navigation, and not for her safety while under seizure in the hands of persons entire strangers to the defendants. The risk was, therefore, varied and enhanced, and there was, consequently, a deviation. In such a case the policy was at an end. 1 Phillips, 306, 480, 481, 483, 484, 485; 2 Peters' Cond. Rep. 403.

Bell v. The Western Marine and Fire Insurance Company.

A deviation is not merely going out of the usual or direct course of the voyage, but it comprehends unusual or unnecessary delay, or any other act of the assured, or his agents, which, without necessity or just cause, increases or changes the risks included in the policy. 1 Phillips, 481. The consequence of a deviation is, to discharge the underwriters from their liability for any subsequent losses. The reason is, not that the property is thereby exposed to risks not insured against, nor that it ceases to be liable to the identical risks that are insured against, but it is that the risks are so affected, and varied, and confounded with others, that it is impossible to show that a loss would have happened but for the deviation. 1 Phillips, 484.

It is a matter of no importance, whether the risk is increased or not. 3 Kent, 312, 313. It is not the contract undertaken by the insurer; it is the substitution of another risk.

5. The steamer was not in a seaworthy condition at the time of the loss. The warranty of seaworthiness extends to the whole time insured. 1 Phillips, 308, 325, 326. The Bayou Sara was under the care and charge of one man. She was not sufficiently manned. The plaintiff is similarly situated to the shipper of goods, who is responsible in case of insurance for the unseaworthiness of the vessel, on board of which he ships his goods, though he did not appoint the captain or crew. 1 Phillips, 586, 587.

Bell having libelled the Bayou Sara, made the Marshal, or his keeper, his agent, to guard her; and Bell ought to have seen that she was well manned, and kept in a seaworthy condition. The Sheriff is the agent of the plaintiff in execution or seizure. *Williams v. Brent*, 7 Mart. N. S. 209. The insured always warrants the seaworthiness of the vessel, no matter who has charge of her.

6. This court has decided, that the insurance in this case attached no further than, to "secure the payment of the debt." Here the defendants were guarantors, as it were, of its payment; and the plaintiff should, before bringing this suit, have given to the defendants notice of the demand and non-payment of the debt so guaranteed. Guarantors are only collaterally liable, on failure of the principal debtor to pay the debt. 7 Peters, 114; 2 Johnson's

Cases, 409. The contract of guarantee, is to be strictly construed. 7 La. 103; 15 Id. 187; 5 Peters, 624.

7. Interest should only run from the date of the judgment, and not from October 23, 1840, the day of judicial demand. Code of Practice, art. 554; 7 La. 134, 506; 8 Id. 572; 11 Id. 236.

8. The notes held by Bell, ought to have been ordered to be delivered to the defendants, if they be condemned to pay the insurance. See authorities as to the effect of abandonment under the first point.

Grymes, on the same side. This cause having been remanded for further evidence on one point, now comes up on the testimony offered by the plaintiff to show, that the defendants had notice of the interest of the plaintiff in the steamboat insured, and that it was the intention of the parties to insure that specific interest.

Upon this, the only point now to be discussed, the defendants will insist upon two grounds of defence: 1st. That the testimony now offered by the plaintiff, is totally inadmissible. 2d. That, if admissible, it does not sustain his case.

1st. It is totally inadmissible. The contract is a written one, and the original proposals are also in writing. The contract purports to be an insurance upon the hull, tackle, and apparel of the steamboat; and the proposals for insurance are to the same effect.

This was clearly proved, upon the former trial, to be an insurance as *proprietor*, upon the vessel as the property of the insured. 4 Mason, 172; 2 Peters, 25; 3d Kent's Com. 257; 2 Mass. Rep. 369.

This contract cannot be varied, or altered, by parol testimony, as to any thing said before, at the time, or after its execution. 13 Mass. Rep. 99. The only exception known in the law, to this general rule is, in some cases, as it regards usage, and to explain commercial terms that may be used in the contract.

The purport of the evidence offered in this case, is to change the whole contract in its very essence, and to make it an insurance upon an *interest* not mentioned in the contract, but clearly excluded by its terms. This, we apprehend, cannot be done.

The more clearly to understand the nature and force of this objection, the attention of the court is particularly called to the testimony. The court will discover that the witness does not appear to

Bell v. The Western Marine and Fire Insurance Company.

have had any personal knowledge of the person, with whom the plaintiff had the conversation he relates; but that he states, that after the conversation was over, and the communication made, the answer of the person (supposed to be Mr. Matthews, the President,) was, *make your application!* Thus clearly showing, that the defendant did not mean to contract in relation to any verbal communications that had been made; but that the whole was to be based upon the written proposals called for at the time, and followed up by the more formal and solemn contract in the policy.

The proposals were made in writing, and the contract or policy, was executed after this conversation. The plain and simple question is,—are these contracts to be changed, in most essential matters, by a conversation which preceded the execution of both instruments? We conclude, that there can be no doubt such testimony should be rejected.

But secondly, suppose, for a moment, that parol testimony could be admitted to vary, or explain the meaning of the parties, as expressed in the written contract, we contend, that the evidence offered is not sufficient to sustain the plaintiff's position.

The only witness offered, is the purchaser of the boat, the real owner at the time the loss occurred. His interest, if not so direct as to render him incompetent, is yet sufficient to create a considerable bias on his mind, and all he says should be received with great caution. He does not appear to have known the name, station, or authority of the person with whom the plaintiff held the conversation he relates, or to have had any knowledge of his person, previous to such conversation, so as to identify him as a person authorized to receive representations, or to bind the defendants. His recollection of what did pass between the plaintiff and the officer of the Company, is entirely too general. Though specially interrogated in the cross interrogatories, he can say nothing as to the particulars of the conversation. He can only speak of the meaning—the end to be arrived at, which was that he had sold the boat, and wished to get *her* insured. It was not stated to whom he had sold *her*, for whose account he desired to insure *her*, nor *what interest* he wished to insure.

Now we conceive that, if the policy set forth a subject matter, or an interest in the thing intended to be insured, with certainty,

in terms, or by legal intendment, and it is sought to substitute another by parol evidence, that the interest so sought to be substituted, should be set forth and proved with equal certainty and clearness. As to the specific nature of the interest intended to be insured, its value, or any other circumstance in relation to it, the testimony is entirely silent, the whole being comprised in the declaration that the plaintiff had sold *her*, and wished to get *her* insured.

The witness does not appear to speak positively, even to the extent that his testimony goes. As to the time when he accompanied the plaintiff to the defendants' office, he begins by saying, "as well as I recollect," &c.; and when he comes to relate the conversation, he says: "and to the best of my knowledge and recollection, stated to him that he had sold," &c. and that the whole time of the visit was from five to ten minutes. There is, therefore, a total want of that certainty necessary to establish a specific contract, in relation to the delicate and complicated subject of insurance and insurable interests; and the only safe plan will be, to let the written contract speak for itself, and to be guided by it.

The witness discloses in his answer, that he was to *pay the premium* of insurance; that he had pledged himself to his endorsers, to keep the boat insured until he paid the price, or his notes given for the price; and he seems to think the insurance was made at his instance. If this be true, it was the interest of the witness that was intended to be insured, and the plaintiff cannot maintain this action. The law will not warrant, and justice does not require, that the plaintiff should be permitted to pocket the amount of the insurance, and leave the endorsers on the witness' notes, for whose protection it was made, exposed to lose the amount of the notes, and this, without his having paid any *premium*, or *consideration*, for the indemnity.

GARLAND, J. This case was before us in January last, and remanded for a new trial, for the purpose of enabling the plaintiff to show that the defendants knew, at the time of making the insurance, that there was an agreement to sell the boat insured to Northam, and that a contingent interest was really intended to be insured, although Bell's legal title was not technically divested. 3 Robinson, 428. To establish this fact of knowledge, the plain-

Bell v. The Western Marine and Fire Insurance Company.

tiff offered the deposition of Northam, the purchaser of the boat. He testified, that the plaintiff and he went together to the office of the defendants, where, he saw only one person, whom the plaintiff addressed as Mr. Matthews; (that being the name of the President of the Company,) that plaintiff stated to him that he had sold the steamboat Bayou Sara, and wished to get her insured. Some other words passed, but what they were the witness does not recollect. The person addressed, said—"make out your application;"—which was done in writing, in the terms expressed in the policy. From the office of The Western Marine and Fire Insurance Company, the witness says, that he and the plaintiff went to the Firemens Insurance office, where two or three persons were present, with whom the plaintiff was acquainted, but who they were, the witness does not know. There, he says that plaintiff made a similar statement to that he had made at the first office. He further says, that his object in accompanying the plaintiff, was to see that an insurance was effected on the boat, he having agreed to pay the premium, and also promised his endorsers that the boat should be insured, and kept so until she was paid for. He says, "Bell stated his interest as described in his conversations with the officers of the two insurance offices." The deposition of this witness, was objected to, by the counsel for the defendants, on the ground of his being interested, and rejected by the court; but judgment was given in favor of the plaintiff, as the Judge below thought that the sale was made on or before the 1st of September, 1839, although the notarial act (which the Judge considered only as higher evidence of the previous agreement,) was not passed until the 6th of the same month, and that the affidavit of the plaintiff in the libel suit, in the United States Court, was not a contradiction of the parol agreement for a sale made on the 1st September. The Judge further said, that when a party insures in his own name, he is presumed to insure as owner, unless he gives notice, and that a change of interest avoids the policy. He then proceeds to say, that when Bell made an insurance in his name, for *account of whom it may concern*, it was a notice that he was not insuring entirely on his own account, and that, if the Company desired further information, it was their duty to call for it. For these, and other reasons stated in his opinion, the Judge below, gave a judg-

ment for the plaintiff, upon precisely the same testimony as was before him in the first instance, from which, the defendants have again appealed.

The first question which arises in the case, is on the bill of exceptions taken by the plaintiff, to the rejection of the deposition of Northam, on the ground of his being interested. In this, we think the Judge erred on the ground taken, as we are unable to see what interest he has in this suit. Let the decision be either way, he is not benefitted by it. If the plaintiff fails in the suit, Northam is bound for his notes to him; if he succeed, it appears to be conceded that those notes will, under the abandonment, pass to the defendants: and so well do the parties seem to understand this, that an agreement exists between them, that the plaintiff shall prosecute their collection, without its prejudicing the rights of either party to this controversy. If the plaintiff does not succeed, Northam is not bound for the premium; if he should succeed, he will be bound, and then his interest is adverse to that of the plaintiff, by whom he is called to testify.

But taking this testimony for all it is worth, the question recurs, does it entitle the plaintiff to recover? The contract of insurance must always be made in writing, (1 Phillips on Insurance, 7;) and must contain the terms of the contract sufficiently expressed. Ibid. 9. When made with a corporation, the reason for the contract being made in writing is stronger. It is, therefore, proper that every necessary stipulation should be expressed. Ib. 8, and authorities. The policy is the contract between the parties, and, as a general rule, all proposals made, or conversations had prior to the subscription, are considered as waived, if not inserted in the policy, or contained in a memorandum annexed to it. 1 Phillips, 24; 13 Mass. Rep. 96, 172. The correspondence of the parties, or any other communications, cannot be referred to, unless for the purpose of explaining some doubtful clause, or ambiguity, or sustaining an allegation of error or fraud, or the like, (3 La. 548,) or something that would have affected the risk. Whether a representation were true or false, may be shown by parol. So may evidence be received to show who is included in the policy, when the assurance is made for the benefit of *whom it may concern*, and the like. But when a party is expressly named, and his interest

specified, or legally understood or presumed, the policy cannot be changed or altered in any manner, by parol evidence, unless on an allegation of fraud, error, or some other legal cause. The principles of construction in regard to policies of insurance, are the same as in all other contracts in writing, in which the intention of the parties is to be sought for, in the instrument itself. Emerigon says, it "is a law from which it is not allowable to depart under the pretext of pretended equity." Vol 1, p. 633, chap. 12, sec. 45. In the English and American tribunals, the doctrine is well settled, that contracts of this kind are to be construed fairly, and according to the words in which the parties have contracted. Plain mistakes in writing, as well as frauds, can be corrected; and, if officers of insurance companies, by their skill and experience, entrap the unwary, or violate the confidence reposed in them, in consequence of their positions, a remedy will be afforded, upon proper allegations and proof. Reliance is often placed in the assurers, or their agents, in consequence of the confidence reposed in them; and if they abuse it they are liable.

As to the losses or risks that may be insured against, it seems to be well settled, that they may be against all losses, except "such as may be repugnant to public policy, or positive prohibition, or occasioned by his own misconduct or fraud." 3 Kent's Com. 228, Lecture 48. It is essential that there should be an interest at risk; but it is not requisite, that the thing to which the insurance relates, or the thing to be assured, should be such, as to have what is properly called a value, or price, or be capable of being assigned. 1 Phillips' Insurance, 67. The life and liberty of a freeman may be insured. So may the life of a debtor, or a person drafted to serve in the militia. 1 Campb. 401; 2 Taunton, 214; 1 Phillips' Insurance, 67. Policies may be made in reference to a future interest, and upon the right of stopping the goods *in transitu* upon the consignee becoming insolvent. The interest of the assured must be subsisting at the time of the loss, in order to give a claim for indemnity. But let us see if the interest must be identical. In 4 Mass. Rep. 330, it was held, that the sale and conveyance in fee of a house insured, which the purchaser at the same time mortgaged back to the vendor, did not divest the assured of his interest under the policy; for, though he

changes his title by the transaction from an absolute to a conditional one, yet he does not part with his insurable interest, since he continues, as mortgagee, to have an insurable interest in the property to its full value. 1 Phillips' Insurance, 72; 3 Burrows, 1512.

In the policy before us, there is no clause forbidding the sale of the boat without the assent of the assurers, and they appeared to have been indifferent as to who should have the control of her, as no one is named as master. On the contrary, they undertake to insure *whoever may be master*. The question as to who would be master, does not seem to have had any weight in estimating the risk; and, we do not see that it would be diminished, or increased, by the interest being that of mortgagee to the full value, or owner.

That a mortgagee has an insurable interest is, in our opinion, unquestionable, and is supported by the best authorities. 1 Phillips' Insurance, 107; 9 Wendell, 404. So has any creditor having a lien on the property. Ibid. 108; 9 Serg. & Rawle, 103; and it makes no difference, if there be a superior lien in favor of another, if something remains for the assured. A lien which is invalid in itself, will not give an insurable interest; but, if it can be enforced between the contracting parties, it is sufficient. For instance, an interest arising from a mortgage not recorded, might be insured, although the mortgage would have no effect against third parties. If the property is held as a security, it gives an insurable interest, and upon this principle rests the right of agents, consignees, and factors, to insure the goods of their principals.

We are of opinion that, at the time of making the insurance, Bell had an interest susceptible of being insured, and also at the time of the loss, although the interest was not of the precise character. We think this case rests upon the same principle as that in 4 Mass. Rep. 330. The policy not prohibiting Bell from selling, we think he could do so, if he did not thereby put the defendants in a worse situation than they were in before; and that having, when he sold, retained a mortgage, or having the privilege of the vendor, he had an interest at the time of the loss.

The counsel for the defendants contend, that a ship, or steamboat, cannot be mortgaged, according to the provisions of the Code, except for special purposes, and in a particular manner, and that

there is no interest in Bell, as his mortgage is not one of those authorized by law. Admitting this to be true, then the privilege of the vendor remains, which creates an interest that can be insured. If the mortgage is invalid, it does not affect the privilege, which we think the vendor of a ship or steamboat has, in the same manner as a vendor of other property. We do not think that they are a class of vendors excluded by the Code; on the contrary, we think their rights are specially recognized by art. 3204, No. 8.

But, say the defendants, if the plaintiff had an insurable interest, he did not properly represent it to us at the time, and the policy is, consequently, void. The defendants have not given any evidence as to the character of the representation that was made, which will enable us to judge of its truth or falsity. The case, therefore, rests upon the policy. Phillips, p. 167, 168, says, "a general description of goods, freight, a ship, a house, or other thing insured," will be sufficient. If one own a half, or other portion of a ship or quantity of goods, he may insure generally, and recover for such interest as he has. 3 Mass. Rep. 133. A mortgagee may insure the thing mortgaged generally, without specifying his interest to consist in a mortgage. 4 Dallas, 421; 2 B. & Ald. 193; 2 Caines' Rep. 19; 13 Mass. Rep. 101.

The defendants have not objected to the deposition of Northam on the ground of its going to explain what took place at the time of applying for the policy; and, as the verity of the representation is denied, which raises a question of fraud, we will consider it. It would appear from it, that the parties understood each other at the time; at least, enough was said, to put the defendants upon inquiring further, if other information was desired. The fact of asking for an insurance for *whoever it might concern*, was calculated to excite attention, and put the underwriters on their guard.

Another ground of defence is, that there was a deviation. This is said to result from the boat having been taken possession of by the Marshal of the United States, when the libels were filed, and carried across the river opposite to the city, and there kept in charge of his deputy and another person, Northam being frequently on board. A deviation is the increasing or varying of the risks insured against, without necessity or reasonable cause. There is no evidence in the record that shows, that the risk was at all in-

Bell v. The Firemens Insurance Company of New Orleans.

creased by the boat being taken across the river.' On the contrary, the evidence is, that boats, when *laid up* on that side, are in less danger than when in the port, or on a voyage, and the premium for insurance is considerably less. The person who had the boat in charge, is shown to have been one accustomed to the business. We are not prepared to say, that every seizure of a ship or steamer, is to be considered a deviation and forfeiture of the policy.

The defendants further insist, that the boat was not seaworthy at the time of the loss, as she had not a captain and crew on board to protect her. When engaged on a voyage, or lying in port receiving or discharging cargo, it is proper that a boat should be properly officered and manned; but, when *laid up*, it is not shown to be necessary, or usual.

Judgment affirmed.

JAMES G. BELL v. THE FIREMENS INSURANCE COMPANY OF
NEW ORLEANS.

APPEAL from the Commercial Court of New Orleans, *Watts, J. C. M. Jones and L. Peirce*, for the plaintiff.

Lockett, Micou and Grymes, for the appellants.

GARLAND, J. This case was before us in January last, and remanded for a new trial, for the purpose of enabling the plaintiff to show, that the defendants knew, at the time of making the insurance, that there was an agreement to sell the boat insured to Northam, and that a contingent interest was really intended to be insured, although Bell's legal title was not technically divested. See 3 Robinson, 422. The case was tried in the inferior court, and a judgment given for the plaintiff, from which the defendants have appealed. The case is in all respects similar to that, of the same plaintiff against the Western Marine and Fire Insurance Company, decided to-day, and we have come to the same conclusion in regard to it.

Judgment affirmed.

FRANCIS SKINNER and others v. JAMES D. DAMERON and others.

Defendants in answer to an action on their promissory notes, alleged that they had entered into an agreement with the plaintiff, and their other creditors, by which a certain per cent on the amount of their debts was to be received as a full discharge thereof, averring a tender of that amount, and that they had been always ready to comply with the terms of the compromise, but that plaintiffs had since refused to accede thereto. Plaintiffs having moved for, and obtained a judgment for the per centage alleged to have been tendered, reserving their right to prosecute for the balance, and ordering the plaintiff to retain out of the per centage enough to defray the costs of the further proceedings should they result in favor of defendants, the latter, having been refused an appeal, moved for a mandamus to compel the allowance of one. *Held*, that defendants having admitted the debt to the amount for which judgment was rendered, and having averred a tender and their readiness to pay, cannot, under art. 567, of the Code of Practice, be allowed to appeal therefrom.

No particular form is necessary to a confession of judgment. Any admission of the debt sued for, which is such, that it leaves no issue to be tried, is, in fact, a confession of judgment. If the admission goes only to a part of the sum claimed, it is a confession *pro tanto*; and there is no reason why the creditor should be delayed in the collection thereof, until a decision be had on the disputed portion.

APPLICATION for a *mandamus* to the Judge of the Commercial Court, *Watts, J.*

Greiner, for the applicants.

Bradford, contra.

MORPHY, J. This is an application for a *mandamus* to the Judge of the Commercial Court of New Orleans, commanding him to allow an appeal from a judgment rendered in the premises. From a transcript of the proceedings in the case sent up by the Judge, and made a part of his return, it appears, that the defendants, being sued on several promissory notes, amounting together to \$3462 38, admitted their signatures and original liability thereon, but alleged, that they had entered into an agreement, or composition with their creditors, and, among others, with the plaintiffs, whereby they all agreed to receive sixty per cent on their claims, which per centage, when paid, was to be in full discharge of the same, and that the plaintiffs, who were parties to this arrangement, had agreed to surrender and give up the notes sued on; that after the other creditors had, in good faith, com-

Skinner and others v. Dameron and others.

plied with the terms of the agreement, and received the stipulated amount, the plaintiffs refused to accede thereto, thinking to obtain the full amount of their notes. The defendants averred moreover, that they had always been ready to comply with the agreement on their part, and had actually tendered to the plaintiffs the stipulated sum. The defendants further averred, that the notes sued on had been extinguished by novation, that they were in no manner liable thereon, and prayed to be dismissed with costs. Under this answer the plaintiffs moved for, and the Judge gave them a judgment for \$2077 62, being sixty per cent on the amount of the notes sued on, reserving to the plaintiffs the right of prosecuting their claim for the balance, and ordering the Sheriff to retain in his hands \$177 62, to defray the costs of the further proceedings, in case the final decision of the cause should be in favor of the defendants. The appeal prayed for, was, in our opinion, properly refused. Article 567 of the Code of Practice declares, that a party against whom judgment has been rendered cannot appeal, when such judgment has been confessed by him. The defendants in their answer, clearly admit their indebtedness to the aforesaid amount, which they aver their readiness to pay, and of which they allege, that they made a tender to the plaintiffs. We are not aware, that under our laws any particular form is required in confessing judgment. Any admission of the debt sued for, which is such, that it leaves no issue to be tried, is, in fact, a confession of judgment. If the admission goes only to a portion of the sum claimed, it is a confession of judgment for such portion; and we can see no good reason why the creditor should be delayed in the collection thereof, until a decision can be had on the disputed part of his claim. Such was the view taken of this matter, in the case of *Parsons and others v. Suares*, (9 La. 411,) and we have no cause to be dissatisfied with the opinion then expressed. In the present case, the rights of the defendants have been fully protected by the amount reserved to pay their costs, if the final decision of the cause shall be in their favor.

Motion overruled.

Harrod and another v. Burgess and another.

JOSEPH HARROD and another v. JOHN BURGESS and another.

The holder of a promissory note cannot proceed by attachment against an endorser, previous to maturity. The obligation of the endorser may never become absolute; the drawer may pay, or, in the event of his failure, the endorser be discharged by the omission of demand, protest, or notice.

A judgment rendered in a State court against a party declared a bankrupt under the act of Congress of 1841, and to whom an assignee had been appointed, without such assignee having been made a party, is a nullity.

A District Court of the United States has no power to revise any decision rendered by a State court.

The assignee of a bankrupt under the act of Congress, of 19 August, 1841, may come into the State courts, for the purpose of protecting the interests confided to him.

APPEAL from the District Court of the First District, *Buchanan, J.*

GARLAND, J. The plaintiffs represent, that the defendants are the endorsers on a promissory note drawn by one Whipple, and not yet due. That the drawer is insolvent, and has left the State, and that the defendants, as such endorsers, will be ultimately liable, and that they (the plaintiffs,) are apprehensive the said endorsers will dispose of their property, and leave the State. They prayed for an attachment against them, which was accorded. Under it a quantity of merchandize was seized, which being perishable, was sold by the Sheriff, and the money retained by him. The defendants moved to dissolve the attachment on the grounds, that they reside permanently in the State, and have no intention of leaving it. That they are not indebted to the plaintiffs, and may never be, as their liability is conditional only; that the affidavit is untrue, the bond insufficient; and that the attachment issued wrongfully, and contrary to law. They also excepted, that the action was premature, and could not be maintained, as the liability was contingent and not fixed; wherefore they prayed, that the suit might be dismissed. The exception, and motion to dissolve having been overruled, the defendants answered by a general denial. Louis F. Fourcher, then intervened, alleging, that he was the owner of the store occupied

Harrod and another v. Burgess and another.

by the defendants, and had leased it to one Justamond, under whom they held it. That the sum of \$500, was then due to him as landlord, and a further sum of \$1166 66, would become due between that time and the expiration of the lease, for which sums he had a privilege on the goods seized, or their proceeds if sold. Wherefore he prayed for a judgment, allowing his claim and privilege, and that he might be paid in preference to the plaintiffs. The plaintiffs answered, by denying the claim of the intervenor, and asserting their preference in virtue of the attachment. The defendants answered the intervention by a general denial also. The plaintiffs had a judgment, with a privilege on the proceeds of the property attached, and the intervenor also had a judgment against the defendants for \$500, and his privilege for that sum was recognized. The plaintiffs, as to this part of the case, asked for a new trial, which, being assented to by the counsel for the intervenor, they withdrew their demand by permission of the court, notwithstanding the opposition of said counsel. On the day this last judgment was signed, and sometime subsequent to the signing of that between the plaintiffs and defendants, Wm. H. White presented his petition, alleging, that the defendants had been declared bankrupts in the District Court of the United States, and that he had been appointed their assignee. That the proceedings in bankruptcy, had been pending during the whole time of those between the plaintiffs, the defendants, and the intervenor. That in virtue of his appointment as assignee, all the actions, rights, and property of the defendants, were vested in him fully, and that he is the lawful owner thereof. He, therefore, prays, that the plaintiffs, the intervenor, and the Sheriff, who had the money in possession, may be cited, and that it be ordered that the funds in the Sheriff's hands be delivered and paid to him. It was admitted that the defendants had gone into bankruptcy as alleged, but both the plaintiffs, and intervenor, continued to assert the validity and legality of their proceedings and judgments, and the supremacy of their respective liens. Upon the trial of this opposition, or intervention, the court ordered, that all the proceedings in the case should be transferred to the District Court of the United States for the Eastern District of Lou-

Harrod and another v. Burgess and another.

isiana, for the purpose of adjusting the rights and privileges on the fund in controversy.

From the judgment allowing Louis F. Fourcher only \$500, he appealed, and from that, on the opposition of White, the assignee of the defendants, Fourcher also appealed.

In this court no counsel has appeared for the plaintiffs. That of the assignee of the defendants has assigned, as errors apparent on the face of the record :

1st. That the attachment ought to have been set aside, on the ground, that the defendants were not indebted when it issued, and might never become so, their liability as endorsers being contingent only.

2d. That there was error in overruling the exception of the defendants, to the suit as premature, no right of action having accrued.

3d. That there was error in allowing the plaintiffs costs previous to the 1st of April, 1842, as the liability of the defendants was not fixed until then, and no action could be prosecuted, until after the party was liable.

The assignee also asserts, that there is no error in the judgment upon his opposition, and he asks, that it be affirmed.

The errors assigned may be considered together, for they all rest upon the same question—were the defendants so liable, on their endorsement for Whipple, as to authorize legal proceedings against them? We think they were not. The suit was commenced against them on the 19th March, 1842, and the note did not become due until the 1st of April following. The obligation of the defendants was dependent on several contingencies. It was possible the drawer of the note might pay it. If he did not, then the plaintiffs were bound to make a demand, a protest, and to give notice to the defendants. The omission of either demand or notice, would have been fatal to the rights of plaintiffs, and such omissions are not unfrequent. The remedy resorted to by the plaintiffs is a harsh one, and they must be held to it strictly. We can see neither justice, or law, in permitting the holder of a promissory note to resort to an attachment against the endorser, previous to the maturity of it. We think the Judge erred in over-

ruling the motions to dissolve the attachment, and to dismiss the suit.

The principal action being disposed of, as a general rule the remainder of the case should share its fate ; but independent of this, there is another objection to the proceedings, so far as it respects the intervenor. Before he appeared in the cause at all, the defendants had gone into bankruptcy, and before the judgment was rendered in his favor, they had been, by the United States District Court, declared bankrupts, and White had been appointed their assignee. At the time when the judgment, from which the intervenor has appealed, was rendered, the defendants were incompetent to stand in judgment, and the assignee not having been made a party, said judgment is a nullity. The suit from its commencement, has been carried on whilst the defendants were applying for the benefit of the bankrupt act without the slightest attention to those proceedings, which is in contravention of the decisions of this court, in the cases of *Fisher v. Vose*, 3 Robinson, 457, and *West v. His Creditors*, 4 Ib. 88.

The judgment of the District Court, on the opposition of the assignee, is somewhat unusual ; and, if it be taken literally, is probably not a final one. It orders, that all the proceedings in this case, be transferred to the District Court of the United States for the Eastern District of Louisiana, for the purpose of its giving a judgment on the respective rights, and privileges of the parties. This is not what any of the parties asked ; nor do we well see how the United States Court could examine into, and decide the matter, as there were judgments already rendered, fixing the sums owing to the plaintiffs, and intervenor, and settling their privileges. These judgments the United States Court would, we suppose, respect, as it has no power to revise the decision of the State tribunal, and we know of no law, that authorizes the transfer of a case like this into the Federal Court. We recently had occasion to say, that the assignee of a bankrupt, had a right to come into the State tribunals for the purpose of protecting the interests confided to him, and White might possibly have had relief if he had prosecuted his claims properly ; but he has not brought before this court Thielen, the Sheriff, who has in his possession the money in controversy, but has

Arrieux v. Dugas, Administrator.

prayed for an affirmance of the judgment, or order of transfer. The parties have made the case so confused, and the proceedings of all have been so irregular and illegal, that we are of opinion, justice will be best promoted by dismissing them all.

It is therefore ordered, and decreed, that the judgment which the plaintiffs, Harrod and Darling, have obtained against the defendants, Burgess and Laithe, be annulled and reversed, and that there be judgment as of nonsuit against them, with costs in both courts. That the judgment rendered in favor of the intervenor, Louis F. Fourcher, be also annulled and reversed, and his intervention dismissed, without prejudice, he paying the costs of it. And considering the order, or judgment transferring the case to the United States Court, as a final order of dismissal, it is affirmed with costs.

Upton, for the plaintiffs.

Fraser, for the defendants.

Cohen, for the assignee.

Bodin and Pilié for the appellant.

ALEXANDRINE ARRIEUX v. IGNACE DUGAS, Administrator of the Succession of Pierre Arrieux, deceased.

The usual publication in the newspapers, calling on all whom it may concern, to show cause, if any they can, why a tableau of distribution of the effects of a succession should not be homologated, is sufficient notice. No citation, or actual notice is necessary.

APPEAL from the Court of Probates of Ascension, *Duffel*, J.

Connely, and *M. Taylor*, for the appellant.

A. Duffel, for the defendant.

GARLAND, J. The plaintiff claims from the estate of her deceased husband, the amount for which he sold a tract of land, which she contends was her property, it having been paid for by her interest in the estate of her deceased father. It appears that her interest was \$5103, in discharge of which, her husband took

a sale of the land to himself, at the price of \$5000, and received the balance in money or property, for which he gave a receipt. The three *arpens* front of land so obtained, formed a portion of a larger tract which Pierre Arrieux sold for \$18,000; and the plaintiff contends, that she is entitled to claim the sum of \$7714, as her proportion of that price, and asserts a lien on the proceeds of the real estate of her deceased husband, in the hands of the administrator. The evidence sustains the allegations in the petition, on this part of the case. But to this demand, the defendant answers, and establishes beyond controversy, that in the year 1838, he presented to the Court of Probates, a tableau or list of debts owing by the estate, accompanied by a statement of the respective mortgages and privileges, and of the amount which was to be applied to their discharge. That on this tableau, the plaintiff was placed, at the instance of her counsel, as a creditor for \$5103, and her lien recognized. That no complaint of any injustice was made. That she purchased property at the sale of her husband's estate, for an amount exceeding the sum recognized, and that, not being able to pay the balance, she was sued by the defendant, and a judgment obtained against her, which was satisfied by the seizure and sale of her property, she, never pretending to have a claim for more than the sum of \$5103, until the institution of this demand. The defendant also pleads *res judicata*, basing his plea on the proceedings had when the tableau was filed, and on the judgment thereon. The counsel for the plaintiff contends that, his client had no notice of these proceedings, as no actual notice or citation has been produced, and a constructive notice is not sufficient. It is shown that the usual notice of a publication in the newspapers was made; and if that were not sufficient, it is difficult to believe, after the plaintiff had been sued by the defendant, for the excess of the price of her purchases at the sale of her deceased husband's estate, and upon an execution, had paid the amount, that she should have been ignorant of the proceedings relating to the homologation of the tableau. As to this part of the plaintiff's claim, we think the plea of *res judicata* is completely sustained.

The plaintiff also claims the sum of \$1467 33, with a privilege on the proceeds of her deceased husband's estate. The defendant denies that she has any privilege, and avers that that question has

Arrieux v. Dugas, Administrator.

also been settled by the homologation of the tableau filed by him. This claim of privilege arises since the judgment of homologation. It appears, that in May, 1834, the Union Bank made a loan of \$3000 to Arrieux and his wife. They gave a mortgage on a tract of land in the Parish of Assumption, and several slaves attached to it, to secure the payment. The husband and wife bind themselves jointly and severally to pay the amount. The property mortgaged, we assume to belong to the community, as the contrary is not shown. The mortgage was recorded in the Parish of Assumption only. The defendant, when he filed his tableau of debts in the Probate Court, placed the Union Bank on it as a creditor for \$3000, with interest, with a privilege on the proceeds of the sale of the land mortgaged, but not on the proceeds of the sale of the slaves, alleging that the mortgage had never been recorded in the Parish of Ascension, where Arrieux and his wife resided, and where the slaves were. The Bank made no opposition, and the tableau was so homologated. The consequence was, that the proceeds of the land were not sufficient to pay the debt to the Bank, and that corporation, some time after, sued the plaintiff as one of the obligors to it, and recovered a judgment for the sum remaining due, which was paid by her, and amounts to the sum claimed. The plaintiff alleges, that she has a right to a privilege on the proceeds of the sale of the real estate of her husband. This, the defendant denies, alleging that the plaintiff has no higher right than the Union Bank had to whose rights she is subrogated: and that, those rights having been settled by the judgment of homologation, she is bound by it; and the plea of *res judicata* is again interposed.

The view we have taken of this part of the case, is different from that of the Judge of the lower Court.* We are of opinion that the provision in the charters of a number of our banks, which authorizes the wife to bind herself with her husband, towards the institution contracted with, does not alter or affect the rights of

* The Judge of the Probate Court dismissed the plaintiff's petition, reserving to her the right of claiming the dividend falling to the Union Bank of Louisiana, on the final partition of the funds reserved for the payment of the ordinary creditors of the succession.

mortgage or privilege in favor of the wife, previously existing, either against the husband or third persons. The provision in relation to contracting with banks, is an exception in their favor, and does not destroy the general mortgage resulting from the wife's becoming security for her husband, and being compelled to pay his debts.

At the time when the tableau was homologated, the plaintiff did not know, that she would be compelled to pay any portion of the debt for which she had bound herself with her husband, as the land alone had sold for \$3000, and she could not know, until a judgment was obtained against her, that she would be compelled to pay the balance of the debt to the Bank. Whilst the proceedings relating to the homologation of the tableau of distribution were pending, she could not anticipate the decision of the Probate Judge, and know that he would decide that the Bank had lost its privilege on the proceeds of the slaves. If a different decision had been given, she would not have had anything to pay. The rights of Madame Arrieux arise subsequent to this judgment, so far as her claim to a legal mortgage is concerned.

The judgment of the Probate Court is, therefore, annulled and reversed, and it is ordered and decreed, that the plaintiff do recover of the administrator of the estate of Pierre Arrieux, deceased, the sum of fourteen hundred and sixty-seven dollars and thirty-three cents, the amount paid by her to the Union Bank of Louisiana, on account of the debt owing said institution, by her said husband; and, that she be placed on the final tableau of distribution of the funds in the hands of the administrator, as having a legal mortgage to secure said sum, on the proceeds of the real estate of said deceased, in his hands to be administered. The other portion of the plaintiff's claim is rejected, and the succession of Arrieux condemned to pay the costs in both courts.

SAME CASE—ON A RE-HEARING.

A married woman has no mortgage on the real estate of her husband, for the reimbursement of money paid by her as his co-obligor *in solido*, where the law authorized her to join in the contract.

GARLAND, J. A re-hearing was ordered, *ex officio*, in this case, a doubt having arisen in our minds as to the soundness of the position assumed, that a married woman has a legal mortgage on the real estate of her husband, to secure the re-payment of money paid by her as his co-obligor, *in solido*, when the law authorizes her to join in the contract. We have re-examined our opinion upon this point, and are satisfied that, in this case, the plaintiff has no mortgage or lien to secure her for the money she paid to the Union Bank. The 25th section of the charter of the Bank, (acts of 1832, p. 62, 64,) makes it lawful for the wife to bind herself, *in solido*, with her husband, and declares that her dotal and paraphernal effects shall, in such case, be affected by the contract. The act nowhere gives her a lien or privilege on the property of her husband, in case she has to pay out of her own estate, and we cannot presume that any such was intended. We have not, in the new Code, been able to find any provision according a lien or general mortgage in a case like the present.

It is, therefore, ordered, that our former judgment be amended, so as to disallow the legal mortgage claimed by the plaintiff, Arrieux.

JOHN MURDOCK v. JOHN GURLEY and others, Heirs of Henry H. Gurley, and the Heirs of Jacob Sides.

The Spanish Governor of the province of Louisiana, Miro, was invested with the power of granting lands within the province. The Marquis de Casa Calvo, a subsequent Governor, had no such authority, the power of disposing of the public domain having been conferred, in October, 1798, on the Intendant, but the Governor

still retained his other civil functions, and was the highest judicial officer in the province.

The Spanish provinces of Florida and Louisiana were under the jurisdiction of the Captain General of Cuba ; but the Governor of Louisiana was always recognized as having authority over the Governor of West Florida, and as having power to grant lands in that province.

APPEAL from the District Court of East Baton Rouge, *Johnson, J.*

R. N. Ogden and A. N. Ogden, for the plaintiff.

Elam, for the appellants.

GARLAND, J. The plaintiff claims a tract of two thousand acres of land, a large portion of which is in the possession of defendants, who also set up a title to it. The plaintiff bases his claim on a patent in favor of Thomas Hutchings, dated the 6th of April, 1776, signed by Peter Chester, the Governor of West Florida, whilst it was a British province. It describes the land as being about four miles east of the Mississippi river, near Baton Rouge, and specifies its boundaries. The grant is in the usual form, and contains several conditions, for the non-performance of which it is to be void, and the land to revert to the crown. Thomas Hutchings was, it is to be presumed, a British subject, although he is described in the evidence as being the Geographer General of the United States, at a period subsequent to the patent, under which the plaintiff claims. The evidence does not show, that he ever was a resident of West Florida, or had any actual possession of the land claimed, whilst Great Britain held that province. No evidence of a compliance with the conditions of the patent is offered ; nor does it appear that the British authorities, or those that succeeded to them, have ever taken any step to have a forfeiture declared.

On the 3d of September, 1783, a treaty was entered into between Great Britain and Spain, by which West Florida was ceded to the latter power. The 5th article of the Treaty says :—
“His Catholic Majesty agrees, that the British inhabitants, or others who may have been subjects of the King of Great Britain, in the said provinces, may retire in full security and liberty, where they shall think proper, and may sell their estates, and remove their effects, as well as their persons, without being res-

trained in their *emigration* under any pretence whatever, except on account of debts, or criminal prosecutions ; the term limited for this emigration being fixed to the space of eighteen months, to be computed from the day of the exchange of the ratifications of the present treaty ; but if, from the value of the possessions of the English proprietors, they should not be able to dispose of them within the said term, then his Catholic Majesty shall grant them a prolongation proportioned to that end." On the 7th of February, in the year 1785, a prolongation of this term was granted for four months ; and on the 5th of April, 1786, another order was issued in relation to the English and American families, remaining at Baton Rouge, and other places, in which the conduct of Governor Miro, in relation to them is approved, and permission is given to them to remain where they are established, on condition, that for the present, they will take an oath of fidelity, and obedience to his Majesty, and that they will not go out of the limits of the place where they are, without an express permission to that effect. 2 White's Recopilacion, 306, 307.

Thomas Hutchings never sold the land granted to him under the provisions of the 5th article of the Treaty of 1783 ; nor does it appear, he ever took the oath of fidelity and obedience to the King of Spain, as required by the last order.

On the 2d of October, 1788, Governor Miro addressed a letter to De Grandpré the commandant at Natchez, in which he says, that he sends him a note or memorandum, which he had received from Don Diegode Gardoqui, the *Chargé d'affaires* of Spain, in the United States, in a letter, in which he recommends to the Governor, Thomas Hutchings, who seemed desirous of settling in the province of Louisiana ; and the Governor proceeds to say, that such a character will be a great acquisition. He then says, that the principal object of the recommendation is, to preserve to Hutchings the lands mentioned in the statement inclosed, among which is the land in controversy. The Governor then directs the Commandant, to make inquiry whether the lands are still vacant and if so, he says : "You will preserve them in that state, and reject any petitions for the purpose of granting them." The commands of Governor Miro were executed by the Commandant and his Surveyor, who made a report in relation to the various

tracts of land ; but little information was elicited as to the one in controversy, though De Grandpré says, he is informed it is still vacant.

On the 31st of March, 1800, Thomas Hutchings Jr. presented himself to the Marquis de Casa Calvo, then acting as the Governor of the province of Louisiana, representing, that he was the son and heir of the grantee from the British Government. That his father had died before he could execute his intention of becoming a subject of the King of Spain. He refers to the letter from Gardoqui to Governor Miro, and to the orders of the latter in relation to the lands mentioned, which include those now claimed, and the various grants made to Thomas Hutchings the elder. He then proceeds to speak particularly of a tract of land near Pointe Coupée, and another on the Comite river, and says : "which two tracts of land, I pray your Excellency to permit me to claim as my own property. I also pray, that I may be permitted to take the oath of allegiance to his Catholic Majesty, which I am ready to do ; and that I be permitted to establish myself on the said lands, with slaves and cattle, &c." He then refers to different persons to establish his good character, and the fact of his being the son of Hutchings, the grantee of the land.

Upon the petition presented to him, the Marquis de Casa Calvo, on the 1st April, 1800, ordered the oath of allegiance to be administered, and then says, that being satisfied, that Thomas Hutchings was rightfully entitled to the property he claims, as descended from his father, he directs, that he be maintained in his possession of those lands, because it is just. Wherefore, he directs Hutchings to appear before the Intendant, to complete what has been done, and adds, that he is satisfied as to his good faith and morals.

On the 20th of January, 1803, Thomas Hutchings presented a petition to Governor Salcedo, in which he represents his desire to sell the land which belonged to the estate of his father in the province, and prays, that he may have permission to do so, on such terms as may be advantageous, which permission was, on the same day, accorded by the Governor, at the foot of the petition. Whereupon, on the 5th of March, in the same year, Hutch-

ings had the land in controversy re-surveyed by Pintado, a legally authorized Spanish Surveyor, and a plat thereof made out and returned to the Commandant of the port; and, on the 7th day of July following, by an act of sale, before De Grandpré, the Commandant of Baton Rouge, the said Hutchings sold the land to Messrs. Cochran & Rhea. By an act passed on the 24th of February, in the year 1824, Cochran & Rhea made a partition of the lands belonging to them, and the tract purchased of Hutchings became the property of Cochran, who conveyed to the father of the plaintiff, who holds it by inheritance.

Before the partition between Cochran & Rhea, the latter presented the claim to the Land Commissioners at St. Helena, for their action on it. They recommended the claim for confirmation, placing it in the first class of claims, and as being a complete grant from the British Government. The report of the Commissioners was acted on in Congress, and on the 3d of March, 1819, an act was passed, confirming all complete grants obtained from the Spanish Government, which were recommended. The act proceeds to say, that "all claims founded on British grants, contained in the said reports, which have been sold, and conveyed according to the provisions of the Treaty of Peace, between Great Britain and Spain, of the 3d of September, 1783, by which that part of Louisiana lying east of the island of Orleans, was ceded to Spain, under the denomination of West Florida, or which were settled and cultivated by the persons having the legal title therein, at the date of said treaty, are recognized as valid and complete titles, against any claim on the part of the United States, or right derived from the United States." 1 Land Laws, 758. 2 Laws, Opinions, &c., 316. Subsequent to the passing of this act, to wit, on the 1st of June, 1820, Cosby, the Register of the Land Office, and Skipwith, the Receiver of public moneys at St. Helena, gave Rhea, a certificate in the usual form, of the confirmation of the claim by the aforesaid act of Congress.

The defendants set up title to that portion of the land which is in their possession, by virtue of occupancy, settlement, and cultivation, previous to the 15th of April, 1813, by themselves, or those under whom they hold, which claims they say were confirmed by the same act of Congress, under which the plaintiff

pretends to hold ; but we do not find in the record any evidence of title at all, except their names being on the plats of survey returned into the court below.

In answer to the petition, the defendants deny generally the claims of the plaintiff. They say, that the British patent to Thomas Hutchings, cannot be the basis of a title against them, because the patentee did not comply with the provisions of the Treaty of 1783, whereby the grant was vacated, and became null and void, and the land reverted to the crown of Spain, and became a part of the public domain. They say, that the recognition of the grant by the Land Commissioners of St. Helena, adds nothing to its effect, and is negatived by the act of Congress, of March 3d, 1819. It is denied, that Thomas Hutchings, the vendor of Rhea & Cochran, was the son of the grantee.

It is also specially denied, that the letter, or order of Governor Miro, in 1788, or the proceedings of the Marquis de Casa Calvo in April, 1800, were intended to recognize the British patent, or that they amounted to a complete grant from the Spanish Government. It is further denied, that Pintado had any legal authority to make a survey, in March, 1803, wherefore no validity was given to the title of Hutchings by it, without settlement and cultivation, and his survey is averred to be null and void. The defendants also deny the validity of the sale to Cochran & Rhea, in July, 1803 ; and they further allege, that the certificate of Coshy and Skipwith, of the confirmation of the claim by the act of Congress of March 3d, 1819, was issued in error and violation of the act, as the claim was not confirmed by it, nor ever intended to be recognized, by any other act of that body. They, therefore, pray to be confirmed in their title and possession, and for a rejection of the plaintiff's claim.

In addition to the facts already stated, it is shown, on the part of the plaintiff, by the production of a plat from the British Surveyor General of West Florida, that the land granted to Hutchings, was legally surveyed on a warrant, previous to the patent's being issued ; and that the patent has been duly recorded in the Register's Office, according to the regulations established for the purpose. It is also proved, that Thomas Hutchings, the vendor of Cochran & Rhea, was recognized by the Spanish authorities

as the son of Thomas Hutchings, the grantee of the land, although by the public he was considered as his natural child. A plat of a tract of land surveyed for Duplantier, on the 7th June, 1805, by Pintado, is also produced, which shows, that it was represented as bounded by the claim of Hutchings. The counsel for the defendants has also referred us to the third volume of the State papers, relating to the public lands, (p. 53, 69,) for the purpose of showing, that on the 5th September, 1806, Pintado certified, that a part of the land covered by this claim was vacant, and that more than one hundred acres of it were granted to a person named Crane, by De Grandpré, the acting Governor at Baton Rouge, whose claim has been confirmed by the United States; but neither the certificate of confirmation, nor any title paper is given in evidence, except an entry, or notice on the plat of the Parish Surveyor, that the claim of the plaintiff covered a part of the land of Crane. We have also been referred to an abstract from the report of J. Cosby, to the Secretary of the Treasury, to show, that Brown & Dawson have been confirmed in a claim for 2000 acres of land, granted to Thomas Hutchings, which answers better to the description of the tract on the Comite river, but no title papers are exhibited.

The District Judge gave a judgment for the plaintiff, and the defendants have appealed.

From the evidence in this case we are satisfied, that the grant to Hutchings by the British Government, includes the land claimed by the defendants. The similarity in the plats of the surveys made, in 1776, by the British Surveyor, and by Pintado in March, 1803, verified by the survey ordered by the court, leaves scarcely a doubt upon the subject. The courses and distances, and natural marks are as nearly the same as two surveys can well be, made at such distant periods.

The patent from the Governor of West Florida, in 1776, it appears, was made in strict conformity to the regulations established by the King of Great Britain, in relation to the granting of lands in that province. From the provisions of the Treaty of September, 1783, between Spain and Great Britain, and the laws of the former country, and those of nations, it is very possible, that the rights of Hutchings might have been lost, but for the acts of re-

cognition, afterwards, by the Spanish authorities. From the provisions contained in the 5th article of the Treaty, it is not to be supposed, that either Spain or Great Britain intended to confer higher privileges on the non-resident subjects of the latter power, than on those who were actually in the ceded territory, which would be the case, if we should decide, that the Treaty did not operate on all alike. The lands of the actual residents, who did not sell within the time allowed by the Spanish authorities, or take the oath of allegiance, were no doubt subject to forfeiture, as the people of the ceded country could not maintain their rights to their property, without allegiance to the government, within whose jurisdiction they were nor could non-resident aliens hold lands in opposition to the will of the Sovereign, within whose jurisdiction the lands lay. It is very certain, that the Spanish authorities in Florida, considered they had a right to declare as forfeited, the lands of British subjects who had not sold in conformity to the Treaty of 1783, or taken the oath of allegiance, and we find recorded a large sale of such property made in the town of St. Augustine, in 1791, after a regular inquiry had been made into all the circumstances, and an appraisement made. 2 White's Recopilacion, p. 383, 384, 385. But the recognitions of the title of Hutchings, the British grantee, by the Spanish authorities, are so full and complete, that they cannot be disregarded.

It has been stated, that in 1785, an extension of time was given to British subjects to sell their property, and that in 1786, the privilege was again held out to all those who would remain, and become Spanish subjects, of retaining the title to lands and other property. No time is fixed by this last ordinance, within which the oath of allegiance is to be taken: the Spanish authorities, therefore, had the right to enforce it when, and against whom they pleased; and, as long as they did not exercise their power, the individual and his property remained subject to their will, or was held by sufferance. In 1788, no measures had been taken to forfeit the land of Thomas Hutchings. At that period, through the Spanish Minister in the United States, he notified the Governor of Louisiana, of his intention to become a Spanish subject. That functionary, in consideration of the services, which such a man would probably render the country, immediately issued his

edict, suspending in favor of Hutchings, the provisions of the Treaty, with a view of extending to him the benefits of the ordinance of the 5th of April, 1786. The object of all parties having been defeated by the death of the elder Hutchings, it was a very natural and reasonable course for the Marquis de Casa Calvo to pursue, to recognize the son of Hutchings, and to invest him with the rights of his father, when he offered to carry into effect the intentions of his parent.

There cannot be a doubt as to the authority of Governor Miro, to grant lands in Louisiana. If he had the power to grant, the power to recognize and ratify a grant previously made, will scarcely be questioned. That he did recognize the grants in favor of Thomas Hutchings, the evidence proves to our entire satisfaction. It is not as formal as a notarial act could have made it; but it is as much so, as many land titles, which have been recognized by all the officers of our government. It was not necessary for him to issue a new grant to Hutchings, as his title from the British Government was complete, as soon as the penalties attached to it were released.

It has been contended, that the Marquis de Casa Calvo had no power to grant lands to any one, and, further, that he had no authority in the province of West Florida. The first proposition is, we believe, correct, as the power of disposing of the public domain had been in the month of October, 1798, vested in the Intendant; but the Governor still retained all his other civil functions, and was, in fact, the highest judicial officer in the province. The acts performed by him seem to us more of a judicial character than any other. He recognized Thomas Hutchings, the younger, as the son and heir of the grantee of the lands from the British Government; he directed the oath of allegiance to be administered to him, and that he should be put in possession of the property descended from his ancestor. When this was done, and it became necessary for the recognized heir to sell the estate, the successor of the Marquis de Casa Calvo, authorized him to do so in the manner most advantageous to his interests. The proceedings are not so formal and complete as some of our Probate Judges would probably have made them, but they seem to contain the substance of all they would probably do in such a case. In

conformity to this order, the Commandant of the port within whose jurisdiction the land is situated, passes a sale of the land, without intimating a doubt of the validity of the power under which he acted, and it has remained unimpeached until attacked by the defendants, whose rights did not arise until some years after.

As to the authority of the Governors of Louisiana in Florida, we believe there is but little doubt. The two provinces were both under the jurisdiction of the Captain General of the Island of Cuba; but the Governor of Louisiana was always recognized as having authority over the Governor of West Florida, particularly in that part of it adjoining the Island of Orleans. There are many grants of land in that part of the State, emanating from the former Governors of Louisiana.

After the most mature deliberation, we are of opinion, that the recognition of the British title by the Spanish Government, is ample and complete, and is entitled to as much weight as if it had emanated from Governor Miro, or Carondelet. We concur in opinion with the counsel for the defendants, that the act of Congress of the 3d of March, 1819, (1 Land Laws, 758,) does not confirm the report of Cosby and Skipwith, as they seem to have supposed, so far as it relates to this claim. But we are of opinion, that the title is complete in itself; and that having been relieved by the Spanish authorities from the forfeitures pending over it, it does not need any further confirmation, than the guaranty made by the Treaty of cession, the laws of nations, and the Constitution of the United States. We think the case as strong as that of *Lavergne's Heirs v. Elkins' Heirs*, (17 La. 220,) and that the same principles are applicable to it.

It has been urged, that the Spanish authorities must have considered the grant to Hutchings as forfeited, as a part of the land covered by it, was subsequently granted to a person named Crane; and that Pintado, when Crane applied for a grant, certified, that the land solicited by him was vacant. The *requete* of Crane, and the certificate of Pintado, are not before us. We cannot, therefore, say to what weight they are entitled. The only evidence of Crane's claim, is found in the plat made by the Parish Surveyor, which shows a confliction between him and

Murdock v. Gurley and others.

the plaintiff. It is impossible for us to judge of the effect of the alleged grant to Crane, as it is not before us. The volume of the State Papers relating to public lands, cited by the counsel for the defendants, states that the application of Crane had been addressed to the Surveyor Kneeland, to certify whether the land was vacant or not. What he did certify, is not shown; although it is possible he did certify the land as vacant, as it appears, that a claim in favor of Crane was afterwards recommended for confirmation.

Judgment affirmed.

SAME CASE.—APPLICATION FOR A RE-HEARING.

The penalty, or forfeiture imposed by the 4th sect. of the act of Congress of the 23th April, 1812, relative to claims to lands in that part of Louisiana east of the river Mississippi and the island of Orleans, on persons claiming under the French, British, or Spanish Governments, who may fail to cause the written evidence of their claims to be recorded in the manner directed by that act, cannot be invoked by parties having no grant from the United States to the land in controversy.

The provision of the same section declaring that no grant, order of survey, deed, conveyance, or other written evidence, which shall not be recorded as directed by that act, shall be admitted as evidence in any court of the United States, against any grant which may be derived from the United States, establishes a rule of evidence for the courts of the United States; but the rule has no binding authority over the courts of the States.

A confirmation of a land claim by the United States, amounts only to a relinquishment of all claim thereto on its part.

Where a bill of exceptions is not mentioned in the argument, nor otherwise insisted on before the Supreme Court, it will be considered as waived.

An order of a Spanish Governor of the province of Louisiana authorizing the oath of allegiance to be administered to a party, and directing him to be maintained in the possession of certain lands, is a public and official act, of which a copy is admissible in evidence. It is not necessary that the original should be produced. Such an act was correctly deposited and recorded in the office of the Parish Judge of the parish in which the land lies, and he is authorized to certify copies thereof.

Elam, for a re-hearing.

GARLAND, J. The defendants have applied for a re-hearing on the grounds:

1st. That they have produced a legal and equitable title to that

portion of the land claimed by them, found within the lines of the British patent.

2d. That they cannot be disturbed by the British patent, *as such*.

3d. That the confirmation of the Spanish Government had no reference to the tract of land in controversy; that it was not so intended, nor so considered by Hutchings, the younger, nor by the Spanish authorities when made, nor by Rhea when he purchased, nor when he presented it for confirmation.

4th. That the title papers from the Spanish Government, whether viewed as a complete or incomplete grant, have no effect, as they have not been recorded in the Land Office at St. Helena.

The principal cause of complaint upon the first ground is, that we did not so fully set forth the evidence in support of the defendants' title, as the record authorized. This was not considered a matter of much consequence, because we considered, under the agreement entered by the parties to try the case on the titles alone, by which the defendants waived all benefit arising from any possession, &c., that enough was admitted to test the strength of the plaintiff's title. We did not consider the defendants as trespassers, and we conceded to them such a title, as was sufficient to try the validity of the plaintiff's. The judgment does not rest upon the weakness of the titles of the defendants, but upon the validity of that of their adversary. Had it been necessary to scrutinize their titles, it might have been found, after the waiver of the benefit of possession, that the abstracts of the confirmation were so general, as to have rendered them of little value as a title. They merely state, that the defendants are confirmed to a certain quantity of land in the parish of East Baton Rouge, designating no particular place, or object, by which it can be located. Both parties, by their agreement, seem to have conceded, that those confirmations covered the *locus in quo*; and we so considered it.

Upon the second ground, we have only to remark, that the decision of the court is not based upon the validity of the British patent, independent of its recognition by the Spanish authorities.

As to the third ground, we think the confirmation by the Spanish authorities, had reference to the land in controversy. In the

Murdock v. Gurley and others.

list of claims furnished by Gardoqui to Governor Miro, this tract is as specially described as any other. No special description was necessary, when the recognition extended to all lands granted by the British Government, if they had not, before 1788, been disposed of by the Spanish Governor. That the Spanish authorities, Hutchings, and Rhea, all understood, that all the grants were recognized, we have no doubt; and for that reason, the documents signed by the Marquis de Casa Calvo and Governor Salcedo, were deposited in the office of the Commandant at Baton Rouge, with the sale from Hutchings to Rhea, which accounts for their being now in the office of the Judge of the parish of East Baton Rouge.

Upon the fourth point, it is proper to premise, that all the papers in relation to the plaintiff's title, were admitted in evidence without objection, except the proceedings had before Casa Calvo, to the introduction of which a bill of exceptions was taken, about which we shall speak again. But the counsel for the defendants insists, that none of these documents can have effect, because they are not all recorded in the office of the Register for the St. Helena Land District. We do not understand this to be the effect, or meaning, of the fourth section of the act of Congress of the 25th April, 1812. 1 Land Laws, 607. That law required of every person, claiming lands under any of the previous governments, to deliver to the Commissioners, when attending for the purpose of receiving notices and testimony, all their title papers and written evidence relating thereto, for the purpose of being recorded; and the act specifies how the notice and papers shall be recorded. It then proceeds, "and if such person shall neglect to deliver such notice in writing of his claim, together with the plat, (in case the lands claimed shall have been surveyed,) as aforesaid, or cause to be recorded such written evidence of the same, within the time and times as aforesaid, his claim shall never after be recognized, or confirmed, by the United States; nor shall any grant, order of survey, deed, conveyance, or other written evidence, which shall not be recorded as above directed, ever after be considered, or admitted as evidence in any court of the United States, against any grant which may hereafter be derived from the United States." A perusal of the section of the act of Congress, shows what pur-

pose was intended to be effected by it. A nearly similar provision has been inserted in almost all, if not in every act of Congress, in relation to the confirmation of land claims in this State. The penalty, or forfeiture, cannot be invoked by the defendants. They have no grant from the United States to the land in controversy. Their claim the government has confirmed, which means, that all claim the United States may have had to the land is relinquished; and that is the extent. So far from granting the land, the Commissioner of the General Land Office has refused to interfere further in the matter, until the rights of the parties shall be determined by this suit. But to give the act its full effect, it only establishes a rule of evidence in the courts of the United States, which has no binding authority on the State tribunals. The rules of evidence are the same, so far as we are concerned, as they were before this statute; and we see no sufficient reason to change them. Our courts are not the inquisitors of the Government of the United States, for the purpose of making inquests, and declaring forfeitures.

The bill of exceptions, taken by the defendants, was especially to the reception, as evidence, of the proceedings had before the Marquis de Casa Calvo, on the grounds: 1st. Of its not being an original. 2d. That it was not properly certified. 3d. That it had not been recorded, as required by the act of Congress. This bill of exceptions was not insisted on, nor mentioned by the counsel for the defendants in the argument of the case. His brief on file is silent in relation to it, and we have no note of it; we were, therefore, right in passing it over, as we supposed it waived. But it is not necessary to resort to any technical objection; and upon the points raised, we say: 1st. That the act is a public and official one, and that a copy could be given in evidence. 2d. That it relates to the title to lands in the Parish of East Baton Rouge, and various persons are interested in it. The depositing and recording of it in the office of the Parish Judge, who is the keeper of the records in relation to those titles, was correct, and he has a right to certify copies of it. 3d. We do not, for the reasons stated, think it indispensable that these documents should have been recorded in the Land Office, to give them effect between the plaintiff and defendants.

It is further urged, that we ought to have directed the defen-

dants to remain in possession, until the value of the improvements made by them was ascertained; and it is now said, that the case ought to have been remanded, for the purpose of having them assessed. The defendants, in their various answers, no where allege, that they have made improvements on the land; nor is any claim presented for their value. It was not for us to suggest the claim for improvements. If the defendants suffer by it, the responsibility is not with us. The judgment below said nothing about the improvements, nor did we, as no amendment of it, in that respect, was asked for. We have adhered to the agreement and points, upon which the case was tried, and do not intend to go beyond them.

Re-hearing refused.

The bill of exceptions, taken by the defendant, was referred to the reception, as evidence of the proceedings had before the Marquette de Case Calve, on the grounds, 1st. That it had been recorded by the act of Congress. 2d. That it had not been recorded, as required by the act of Congress. The bill of exceptions was not mentioned or not mentioned by the court. It is the duty of the defendant in the argument of the case. It is the duty of the defendant to show, as we supposed it was, that it is not necessary to resort to any technical objection, and upon the points raised, we say, 1st. That the act is a public and official one, and that a copy could be given in evidence. 2d. That it is a right to the title in lands in the Parish of East Baton Rouge, and various persons are interested in it. The deposition and recording of it in the office of the Parish Judge, who is the keeper of the records in relation to these titles, was correct, and he has a right to certify copies of it. 3d. We do not for the reasons stated, think it indispensable that these documents should have been recorded in the Land Office, to give them effect between the plaintiff and defendant. It is further urged, that we ought to have directed the defendant

CASES

RECEIVED AND ENTERED

1878

SUPREME COURT OF LOUISIANA

WESTERN DISTRICT OF LOUISIANA
APPEAL 1878

EXHIBIT

HON. FRANCIS XAVIER MARTIN
HON. HENRY A. BULLARD
HON. ALFRED MORRIS
HON. EDWARD SIMON
HON. RICH. GARLAND

JOHN GARDIN & JAMES MERRILL and others

The respondents of the writ of habeas corpus in the above entitled cause
vs. the respondents of the writ of habeas corpus in the above entitled cause
The respondents of the writ of habeas corpus in the above entitled cause

Appeal from the Court of Probate of St. Mary, Missouri.
Replevin for the plaintiff.
Replevin for the plaintiff.
Michael, J. James Morgan was sued in his own right
and as co-owner of Edward Morgan, his brother, as defendant, for
a sum of \$100.00, being the balance of an account due to him
Morgan, who died during the pendency of the suit
which had been brought in the District Court of the Fifth Judicial
District; and the heirs and legal representatives were made parties.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF LOUISIANA,
IN THE
WESTERN DISTRICT, AT OPELOUSAS,
SEPTEMBER, 1843.

~~~~~  
**PRESENT:**

**HON. FRANÇOIS XAVIER MARTIN.**  
**HON. HENRY A. BULLARD.**  
**HON. ALONZO MORPHY.**  
**HON. EDWARD SIMON.**  
**HON. RICE GARLAND.**

~~~~~

JOHN GREIG v. JAMES MUGGAH and others.

The assumption of the quality of heir in an authentic act, is an unconditional acceptance of the succession. C. C. 982.

The acknowledgment of a debt by an agent; will stop prescription. C. C. 3486.

APPEAL from the Court of Probates of St. Mary, *Moore, J. Voorhies*, for the plaintiff.

Splane, for the appellants.

MORPHY, J. James Muggah was sued in his own right, and as curator of Edward Muggah, his brother, an absentee, for a sum of \$489 31, being the balance of an account due by John Muggah, their father, who died during the pendency of this suit, which had been brought in the District Court of the Fifth Judicial District; and his heirs and legal representatives were made par-

ties. On a plea made to the jurisdiction of the District Court, the case was finally decreed by this tribunal to be transferred to the Court of Probates of the Parish of St. Mary, on the ground, that the succession of James Muggah was under the care of an administrator, who was also tutor to the heirs, and who, could not accept the succession absolutely; and, that such defendants were suable only in the Court of Probates. See 11 La. 360.

James Muggah had pleaded payment, compensation, prescription, &c. In the Court of Probates, his heirs filed another answer, excepting to the jurisdiction of the latter court, on the ground, that the case had been illegally transferred to it, and should have been dismissed, if the District Court was without jurisdiction. They further denied the personal responsibility of James Muggah, for any part of the debt claimed of the estate of his father, John Muggah, which, they averred, he had accepted only with the benefit of inventory, &c. The Judge below, rendered a judgment in favor of the plaintiff, against the estate of James Muggah, for \$241. The defendants have appealed.

The plea to the jurisdiction of the Probate Court was properly disregarded. The decree of this court, ordering the transfer of the cause, being *res judicata* between the parties to this suit, we cannot inquire whether this transfer was authorized by law or not. Had the suit been dismissed, it must, under the principles laid down in that decision, have been brought in the very court from which it now comes up. Even if the transfer was unauthorized, the suit could hardly now be dismissed on that account. *Multa quæ fieri non debent, facta valent.*

James Muggah, the father of the present defendants, in an authentic power of attorney given to the plaintiff shortly after the death of his father, John Muggah, expressly assumes the quality of heir, thus accepting the estate unconditionally. Civil Code, art. 982. Nothing should prevent the plaintiff from recovering from his estate, the proportion for which he became personally liable, as one of the heirs of John Muggah. Civil Code, arts. 1375, 1376, 2112. Code of Practice, arts. 113, 120. As to the other heir, Edward Muggah, no legal steps appear to have been taken to prosecute the suit against him.

The plea of prescription cannot be maintained, as we find on

Dugat v. Comeau.

the record, an acknowledgment of the correctness of those items to which it might have applied, made by the agent of James Mugah, about nine months before the inception of the present suit. Civil Code, art 3486.

On the merits, we have examined the evidence, and can perceive no material error in the conclusion to which the Judge below has arrived.

Judgment affirmed.

ROSEMOND DUGAT V. EREMISE EMÉRENTHÉ COMEAU.

A woman of full age, not under the control of a husband, stands on the same footing as any other person able to contract. She will be presumed to have intended to bind herself in the manner in which she actually bound herself, and will not be listened to when she simply alleges that she acted unadvisedly, and without sufficient information. C. C. 1775.

A clear case of error, or want of consideration must be shown, to release one from an obligation who has, under his signature, acknowledged his indebtedness, and admitted a consideration.

An act, not authentic from want of form, will be obligatory as one *sous seign privé* C. C. 2232.

APPEAL from the District Court of Lafayette, Campbell, J.
Moore, for the plaintiff.

Crow and Porter, for the appellant.

MORPHY, J. The plaintiff having instituted executory proceedings upon a mortgage of several slaves, executed by the defendant to secure the payment of a note for \$981 61, drawn by her to his order, she enjoined the proceedings on the ground, that the act of mortgage was not executed before Charles M. Olivier, the Parish Judge of Lafayette, as it purports to be; that she never was indebted to Rosemond Dugat in the sum therein set forth; that the act was never read or explained to her, so that she could understand its purport, and that it was signed only in the presence of the subscribing witnesses, and of one or two other persons; that she was under the impression that she was signing an instrument as security for E. F. Arcenaux, for a very small sum of money, not half as much as that now claimed of her; that the act is false and

fraudulent, and should be declared null as such. In answer to the petition for an injunction, the plaintiff denied all the allegations therein made, and prayed for judgment for the amount of the note and mortgage sued upon, thus turning the executory, into proceedings *via ordinaria*; whereupon, a trial being had, there was a judgment below in favor of the plaintiff for the amount claimed, from which judgment the defendant prosecutes the present appeal.

O. Mouton testified, that he was one of the attesting witnesses to the act of mortgage, and that it was executed and passed at his house; that the persons present were Emilien Arcenau, John Greig, John L. Daniel, and Emile Arcenau; that the Parish Judge was not there; that the defendant did not read the act over before signing it, but stated that she knew its contents. Martin Comeau, the husband of the defendant, from whom she is separated from bed and board, was not present when she signed; that Mr. Greig asked her if she knew what she was signing, stating to her that it was a mortgage for another person's debt; she said she knew it, and her brother then observed, that he had informed her of its contents. This witness adds, that after the execution of the note and mortgage, the defendant told him that she had sent for Mr. Grieg to explain it, that he had done so, and that she was satisfied it was all right.

Greig, the other subscribing witness, declared that when the mortgage was executed the Parish Judge was not present; that he (the witness,) was sent for to explain the act; that he thinks, he either read it over or explained it to the defendant, or else was told by her that she understood it; that he would not otherwise have attested its execution; that there were certain blanks as to date, amount, &c., in the act, which were filled up by himself, (the witness,) and that the note sued on is in his handwriting.

From this evidence, which is all that the record furnishes, it does not appear to us that there was any fraud or imposition practised upon the defendant. If the act was not read to her by some of the persons present, it was, no doubt, because she declared herself aware of its contents. She appears to have perfectly understood that she was binding herself and her property for the debt of her brother, E. F. Arcenau, which she had a right to do, being of full age, and separated from bed and board from her husband. Her

Johnson v. Brashear.

willingness to assume the debt of her brother, was a sufficient cause or consideration for the obligation she entered into. If, as she now alleges, there was error as to the amount due by her brother, she could easily have shown it by his testimony, which she has not attempted to do. Her simple allegation cannot be admitted to show error in the amount she acknowledged to be due under her signature. A woman of full age, not under the control of a husband, must stand on the same footing as any other person able to contract. She will be presumed to have intended to bind herself in the manner and form in which she actually bound herself, and will not be listened to if she simply alleges that she acted unadvisedly, and without sufficient information. Civil Code, art. 1775. A clear case of error, or want of consideration must be shown, to release from his obligation a party who has, under his signature, acknowledged his indebtedness, and admitted a consideration. The present is not such a one.

The deed of mortgage, although not good as an authentic act, is binding on the defendant as an act under private signature. Civil Code, arts. 2232, 3272, 1890.

Judgment affirmed.

MADISON C. JOHNSON v. WALTER BRASHEAR.

One acting as an agent, may sue in his own name for the recovery of the amount of a draft drawn by himself, and accepted by the debtor of his principals.

APPEAL from the District Court of St. Mary, *Boyce, J.*

SIMON, J. The plaintiff seeks to recover the amount of a draft, or bill of exchange, dated 17th of February, 1841, drawn by him to his own order, at Lexington, upon the defendant, for the sum of \$5319, and accepted by the latter.

The defence is, that no consideration was ever received for the draft; and interrogatories having been propounded by the defendant to the plaintiff for the purpose of showing the alleged want of consideration, they were answered in substance as follows: 1st.

That the consideration of the bill sued on was a debt due to the heirs of Robert R. Barr, deceased, by the defendant, who had purchased the interests of the wives of Benjamin and Elisha Warfield, in the estate of the deceased, the said wives being heirs or devisees of said Robert R. Barr. That as a part consideration thereof, the defendant had agreed to pay the debts of the deceased in Kentucky, and respondent was requested by defendant to ascertain the amount of said debts, and to draw on him for the amount thereof. That respondent, at the request of the defendant and Warfield, consented to act in the matter, and ascertained the debts to amount to \$5319, and made his draft on defendant accordingly. That the transaction was communicated by respondent to the creditors of the deceased, and the bill remaining unpaid, he was ordered and directed by said creditors to have suit brought thereon. 2d. That he is owner of a small claim, against the estate of Barr, amounting to \$37 33.

On the trial of this suit below, the defendant introduced in evidence, a letter signed by one Thomas B. Warfield, calling himself the agent and attorney in fact of the heirs of Barr, dated New Orleans, 1st of March, 1842, purporting to be a new arrangement or agreement in relation to the payment of the debts of Barr's estate; and to an extension of time to pay the same; which new arrangement appears to have been accepted by the defendant, under his signature at the foot of the agreement. The draft sued on is not in any way mentioned or alluded to in the letter containing the propositions, or agreement; and appears to be unknown to the self styled agent of the heirs. No evidence has been adduced to show that Thomas B. Warfield was the agent of Barr's heirs.

On this evidence, the Judge, *a quo*, rendered judgment in favor of the defendant as in case of nonsuit, and the plaintiff has appealed.

We think the inferior Judge erred. The bill sued on is in the hands of the plaintiff for the benefit of Barr's creditors, who ordered this suit to be brought thereon; and it is clear, that the heirs of Barr have no further interest in the matter. The draft, though in the name of the plaintiff, belongs to the creditors; but he may well maintain this action in his own name for the re-

Le Breton, Curator, v. Lewis.

covery of the amount due thereon to the creditors, for whose benefit the acceptance was obtained. 4 Mart. N. S. 481. 2 La. 264. The plaintiff acted originally as their *negotiorum gestor*; his act was approved by them subsequently; and by drawing the bill and obtaining the acceptance, he became responsible to the creditors for its amount. In our opinion, he has a right to sue for its recovery. 5 Mart. 201. *Garland v. Lockett*, 5 Ib. N. S. 40. 4 Ib. N. S. 107.

It is therefore ordered, that the judgment of the District Court be annulled and reversed; and that ours be in favor of the plaintiff, as prayed for in his petition, with costs in both courts.

Maskell and Lewis, for the appellant.

Dwight, for the defendant.

NOEL BARTHELEMY LE BRETON, Curator of the vacant succession of Jean Gravier, deceased, v. ALEXANDER LEWIS.

Natural and well ascertained objects must control in the location of claims to land. Specified courses and distances must yield to them, if they cannot be reconciled.

APPEAL by the plaintiff from a judgment of the District Court of St. Mary, *Campbell, J.*, in favor of the defendant.

Maskell and Voorhies, for the appellant.

T. H. Lewis and W. B. Lewis, for the defendant.

GARLAND, J. The plaintiff, in his petition, claims a tract of land of 1200 superficial *arpens*, in the Parish of St. Mary, "on the *Bois de Cassine*, on the left ascending the road of Yoelé, bounded on both sides by the public domain," under an order of survey signed by Governor Miro, dated the 3d June, 1786. The claim was confirmed by the United States Commissioners on the 25th of June, 1812, and in the certificate, it is said to be situated, "on the *Bois de Cassine* on the left ascending the road of Yoelé;" and in the notice which was presented, when the claim was asked to be confirmed, it is said that a plat of survey made a portion of the documents, but it has been withdrawn from the office, and is

Le Breton, Curator, v. Lewis.

not produced. The counsel for the plaintiff, in presenting the evidence in support of the title of Gravier, did not think proper to lay before the court, with the order of survey of Governor Miro, the *requête* or petition of Jean Gravier; but the defendant has given it in evidence, and in it, J. Gravier prays the land be granted, "*situé au Bois de Cassine, sur la gauche en montant du Chemin d' Yoclé, laquelle dite face court sud ouest et nord est, borné des deux côtés par le domaine, &c.*" It is clear from this testimony, that the land confirmed to Gravier, is to be located at a particular place, and the direction of the front line is indicated. The parol evidence establishes clearly, where the Bois de Cassine is situated in the Parish of St. Mary. It is proved to be a well known, and rather remarkable place, from the fact of the great number of the tree or bush called *Cassine*, which grows there. It is further shown, that at, or near the entrance into this wood, near the road, is a live oak tree on which are the marks of a surveyor, and the letter G. These marks are very ancient. Several witnesses speak of the tree, and say it was always known as the corner of the Gravier claim; and one of them testifies, that the tree was shown to him about the year 1828, by an old man, who said that he was present at a survey made of the claim more than twenty years previous, and that this tree was fixed as the beginning corner, by a surveyor. This old man showed the witness the direction of the line. He died six or seven years before this suit was commenced.

Notwithstanding the description in the *requête* and certificate of confirmation, of the place where the land should be located, a deputy surveyor of the United States, named William Johnson, made a survey of the land in the month of April, 1815, and from his plat on file it appears, that he located the claim at a place not known as the *Bois de Cassine*, although he has marked on his plat two such places. The land, instead of being on the left of the Yoclé road, is on both sides of it; and the front line, instead of being from north east to south west, is almost north and south. Not a single witness is produced who says, that either of the two pieces of wood, marked on Johnson's plat as the "*Bois Cassine*," was ever known by that name; and some of them speak from a recollection and acquaintance with the localities for forty-five

Le Breton, Curator, v. Lewis.

or fifty years. The *procès-verbal* of this surveyor, does not state that in making the survey, he acted under any authority from his principal. He says: "I have re-surveyed, measured, and marked, (in part,) the boundaries of a tract of land claimed by Gravier, &c." The plat shows, that the greater part of one line, the whole of another, and a part of a third, were never traced by the surveyor at all, as he says, the swamp was too full of water and boggy. This plat is certified to have been "examined and approved," on the 15th of June, 1815, by Fitz, the principal deputy surveyor for the district.

Independent of the errors apparent in the above mentioned survey and plat, it is shown by another plat presented by the defendant, that the same surveyor had, on the 26th of June, 1814, "surveyed, measured, and marked in part," for the defendant, the piece of land in controversy, stating it as adjacent to, and back of his, defendant's land, fronting on the bayou Tecke, and as being claimed "as his preference right."

The counsel for the plaintiff contend, that as Gravier's claim has been located, and the survey confirmed by the principal deputy surveyor since the year 1815, he is entitled to hold the land. The court below was of a different opinion, and we think there is no error in the judgment. We are much disposed to respect ancient and well established locations, and will not, except upon strong grounds and clear testimony, disturb them; but where errors so apparent and gross exist as in the present case, we are compelled to disregard them. The location of Johnson is clearly erroneous, to say the very least of it. Gravier has never had any actual possession of the land; that is to say, neither he, nor any one for him, had ever been on it, since the location of Johnson, until about the time of commencing this suit, so that the attention of other proprietors was not directed to his claim.

It is a well settled and universal rule, that natural and well ascertained objects must control in the location of claims to land. Specified courses and distances must yield to them, if they cannot be reconciled; but where the object is easily found, and the course ascertainable, there is no excuse for departing from the calls of the title. A surveyor, who surveyed the land under the order of the court, says, that he has seen the old marked tree in

Succession of Allen J. Key—Maskell, Curator, Appellant.

the *Bois de Cassine*; that by commencing at it, and running the front line as indicated in the *requete*, the claim can be correctly surveyed; and that it cannot be done in any other manner.

That the plaintiffs have a title to land at the *Bois de Cassine*, is not disputed by the defendant; but that is a considerable distance from the place in his possession, and there is no interference.

We think it unnecessary to go into an examination of the title set up by the defendant, as the plaintiffs have failed to show any to the land it covers.

Judgment affirmed.

SUCCESSION OF ALLEN J. KEY — THOMAS MASKELL, Curator, Appellant.

APPEAL from the Court of Probates of St. Mary, Dumar-trait, J.

Maskell, appellant, *pro se*.

Gibbon, contra.

SIMON, J. This suit is brought by the curator of the estate of Allen J. Key, for the purpose of being authorized to sell several slaves, whom the deceased, in an instrument purporting to be his last will, made in the form of a nuncupative testament under private signature, directs to be emancipated. The curator alleges, that said will is null and void, and prays, that it may be so declared, and the succession disposed of for the benefit of the legal heirs of the testator, without any regard to the dispositions contained in his testament.

Issue was joined by one of the legatees, who, in support of the legality of the will, avers that the same has already been admitted to probate as being in due form, and ordered to be executed. She prays that it may be carried into effect, and that she be decreed to have an equal share with the other heirs of the deceased.

The inferior court declared the will valid, and ordered that it

Succession of Allen J. Key — Maskell, Curator, Appellant.

should be carried into execution. From this judgment the curator has appealed.

The only ground urged before us, and relied on by the appellant's counsel against the validity of the will under consideration, is, that it was not read *by the testator to the witnesses*, nor was it read *by one of the witnesses to the rest* in the presence of the testator. This is one of the requisites of the 1575th art. of the Civil Code, and whether it was complied with or not, is a question of fact, the solution of which must be sought for in the parol evidence adduced in support of the validity of the testament.

It appears from the testimony, that the will was dictated by the testator to one of the witnesses, (Conrad,) in the presence of all the other witnesses; that after being written by the witness Conrad, it was read over to the testator, in the presence of all the witnesses who subscribed the will; and that, upon being asked if that was his will and if it was all right, the testator answered it was. It is true the witness, Conrad, states in his testimony, that *he is not sure* that he read it himself to the testator, but that his opinion is that he handed it to Mr. Bowles, (who is not one of the witnesses to the will,) after he, Conrad, had commenced reading it, and that it was then read over by Bowles. But one of the other witnesses to the will, (Anderson,) after first saying that he was not positive whether the will was read by Conrad or by Bowles, appears to state from further recollection, and in positive terms, that "the will was read over by Conrad to all the witnesses in the room of the testator in an audible voice, and that said will was afterwards read over by Bowles to the testator in presence of all the witnesses." If the will was read in an audible voice in the room of the testator, who was then sick in his bed, it necessarily follows that it was read in his presence, and he must have heard it. However uncertain it may appear, the Judge who tried the cause below, and who saw and heard the witnesses who testified before him, was of opinion that the legal requisites had been sufficiently complied with, and that the will had been read by one of the witnesses to the rest, in presence of the testator; and we are not prepared, from the evidence, to say that he erred. Certain it is, that no fraud could have been committed, since the will was dictated by the testator in the presence of the witnesses, to whom

Carson, Administrator, v. Dwight and another.

it appears to have been read twice successively, and the testator was satisfied of its correctness after it had been read over to him.

Judgment affirmed.

JOHN CARSON, Administrator of the Succession of Milton Johnson, v. WILLIAM C. DWIGHT and another.

The commencement of a suit for freedom by a slave sold by plaintiff to defendants, cannot justify the latter in withholding the price, nor is it ground for annulling the sale. All that defendants can require is security for the title, or for reimbursement for the price in case of eviction.

In an action for the price of a slave, resisted on the ground of a suit for freedom having been instituted by such slave, for the purposes of justice the court may order a stay of execution till security be given against the danger of eviction, though not prayed for in the answer, and even though there be no prayer by defendant for general relief.

APPEAL from the District Court of St. Mary, *Campbell, J.*

Maskell, for the plaintiff.

The appellants appeared for themselves.

SIMON, J. The defendants are appellants from a judgment condemning them to pay, *in solido*, to the plaintiff, the sum of \$131 88, with interest, as being the balance due upon the price of a negro woman named Isabella, purchased by one of the defendants, for the sum of \$700. The negro woman having been seized and sold to satisfy the second instalment of the price, being \$350, brought only \$290, which, after paying the costs, was applied to the satisfaction of the debt to the amount of \$232 62.

The defendants resist the claim set up by plaintiff, on the ground, that the woman Isabella is entitled to her freedom, as she was brought from Texas into the United States, contrary to the laws of the United States, and as she came from a country where slavery was not, at that time, tolerated. They further allege, that they paid the first instalment of the price, to wit, \$350; and that a suit has been brought by Isabella against the purchaser at the Sheriff's sale, for her freedom. They oppose the amount by them paid on the first instalment, as a reconventional demand against the plaintiff; and pray, that the sale may be declared null

Carson, Administrator, v. Dwight and another.

and void, that the plaintiff's demand be rejected, and that judgment may be rendered in their favor, against the plaintiff, for the sum of \$350.

The right of the defendants to recover the amount of their reconventional demand, clearly depends upon the result of the suit instituted by Isabella; and this right will exist only in case it be decided, that she was entitled to her freedom at the time of the sale. But it is clear, that this question cannot be inquired into collaterally in this suit; and that, as the case stands, it cannot be used as a defence against the payment of the price, nor be invoked as a ground of nullity against the sale. Isabella has brought a suit, which is yet undecided; and all that the defendants may perhaps require of the plaintiff, is, that he should give them security for the title transferred, and for the reimbursement of the amount paid, in case of eviction. 6 La. 221. This, however, does not appear to be sought for at our hands. The answer contains no prayer to that effect. It does not even pray for general relief. The slave was sold without any opposition, on the part of the defendants, to the Sheriff's proceedings; and we are of opinion, that with regard to the reconventional demand, the same is premature, and can only be set up after the final result of the suit instituted by Isabella, in case she succeeds. We are constrained to reject it; but we are disposed, however, for the furtherance of justice, to relieve the defendants against the danger of eviction, though not prayed for in the answer.

It is, therefore, ordered, that the judgment appealed from be affirmed, with stay of execution, till the plaintiff gives to the defendant good security to protect him from injury arising from the slave succeeding in her suit; the appellee paying the costs of this appeal.

The New Orleans Gas Light and Banking Company v. Hudson and another.

THE NEW ORLEANS GAS LIGHT AND BANKING COMPANY v.
BENJAMIN HUDSON and another.

Inaccurate or ungrammatical language in the certificate of a notary, will not vitiate it, where the meaning is obvious.

Every means of defence, such as payment, release, novation, &c., which goes to show the extinguishment of an obligation admitted, or proved to have once existed, must be pleaded specially, and cannot be urged under the general issue, which only denies the facts alleged in the petition. The plaintiff might otherwise be taken by surprise.

A plea of release not made in the lower court, will not be listened to by the Supreme Court. This defence will be presumed to have been waived.

APPEAL from the District Court of St. Mary, *Boyce, J.*

Splane, for the plaintiffs.

W. C. Dwight, for the appellant.

MORPHY, J. Jared Y. Sanders, is appellant from a judgment rendered against him, as the second endorser of a note drawn by one John D. Hart, to the order of, and endorsed by Benjamin Hudson, his co-defendant. The record shows, that on the 13th of October, 1842, a judgment was entered up, with the consent of the counsel of the first endorser, with a six months' stay of execution, but, as it had through mistake been made to apply to both defendants, it was on the following day set aside, so far as concerned Sanders, who immediately filed an answer, pleading the general issue, the illegality of the protest, and want of notice. The protest, which is in due form, shows, that the note sued on was presented at the office of discount and deposit of the New Orleans Gas Light and Banking Company at Franklin, where it was made payable, that payment thereof was demanded, and that the answer made was, that it could not be paid. As to the notice of protest, the notary's certificate mentions, that he gave notice of the protest of this note to the endorsers by means of two written notices, addressed to Benjamin Hudson, Franklin, La., and to Jared Y. Sanders, at Dutch Settlement, St. Mary, La., which notices he *remitted* at the post office at Franklin, on the day of the protest; and it is shown, that the Dutch Settlement is the nearest

The New Orleans Gas Light and Banking Company v. Hudson and another.

post office to the residence of Sanders. Although the certificate is not couched in very appropriate language, yet it can convey no other meaning than that the notice to the appellant was transmitted to him through the post office, on the day of the protest, which we think is sufficient. It has been urged in this court, that the delay granted to the first endorser, must have the effect of relieving the second. That such is the effect of an extension of time granted to the maker, or the first endorser of a note, cannot be disputed; but this defence was not set up below, nor has even the fact of this stay of execution been given in evidence, although it appears in the record as one of the entries made in the suit, *in solido*, against the two endorsers. Every means of defence, such as payment, release, novation, &c., which goes to show the extinguishment of an obligation admitted, or proved to have once existed, must be specially pleaded, and cannot be urged under the general issue, which only denies the facts set forth in the petition. If, under such a plea, the defendant were permitted to set up a special defence, the plaintiff would be taken by surprise, and deprived of the means of meeting the defence. This court, moreover, is called upon to review the decisions of inferior courts, on the facts and pleadings as they were presented to them, and will not listen to pleas not made below. The defendant's answer was filed on the day after the consent judgment was entered against the first endorser, and with a full knowledge thereof. If he did not think proper to avail himself below of this defence, he may well be presumed to have waived it. Had he made such a plea, the plaintiffs might have shown, that the stay of execution was granted with his consent.

Judgment affirmed.

In the Matter of the TUTORSHIP OF VIRGINIA KERSHAW.

The case must be a very strong one that will justify the removal of a parent from the tutorship of child, on the ground of notorious bad conduct. It should not be done on light or doubtful testimony.

THOMAS B. KERSHAW, is appellant from a judgment of the Court of Probates of St. Mary, *Dumartrait, J.*, removing him from the tutorship of his child on the ground of notorious bad conduct.

GARLAND, J. The petitioner alleges and proves, that he is the uncle of the minor child of Thomas B. Kershaw, who is her natural tutor. He avers that the conduct of said Kershaw is notoriously bad; that he is intemperate, and not a suitable person to continue to act as such tutor. He, therefore, prays for his removal, and the appointment of another tutor. The allegations are denied, and the answer asserts that the petitioner is actuated by interested motives, in the prosecution of this action.

The record shows, that about one year since, Kershaw was confirmed in the tutorship of his child, and appointed the administrator of the estate of his deceased wife, for the faithful administration of which, he gave security as required by law. The petitioner then made opposition to his appointment, on grounds nearly similar to those upon which he now urges his removal from the situation of tutor, but was unsuccessful. There is no allegation of unfaithfulness, either as tutor or as administrator, and the demand for removal rests on the ground of notorious bad conduct, on the part of Kershaw. To establish this, various witnesses were examined by the petitioner, who proved that Kershaw frequently got drunk, but was more frequently so some six months previous to the trial, than subsequently to that period. Two or three of the witnesses, who are near relatives of the petitioner, said that Kershaw keeps a female slave belonging to his child, as a concubine; but, upon being asked as to their reasons for the belief, they gave none, but their own suspicions, except one of them, who testified, with an evident bias in favor of the petitioner, and said that Kershaw once told him, when drunk, that he was the father of a child by the girl. Several of the witnesses for the petitioner say,

Dickerson v. Gordy.

that when Kershaw is sober, which is more frequent now than formerly, he is a good neighbor and citizen. That he is very much attached to his child, and she to him. On the part of the tutor, eight or ten witnesses were examined, some of whom had known him from childhood and others for different periods of time. They all represent him as addicted to using ardent spirits to excess. When drunk, they say, that he is inoffensive; when sober, he is quiet, and a good citizen. It is shown that the child is boarding in a respectable family, and going to school; and that Kershaw manifests the warmest affection for her. There is no evidence that he is wasting her property.

We have examined the testimony closely, and are unable to agree with the Probate Judge in his conclusions. The case must be a very strong one, that will justify the removal of a parent from the tutorship of a child, for notorious bad conduct. A judgment of that kind fixes a stigma upon the character of the parent, which will, in some degree, attach to the child, and should not be given upon light or doubtful testimony. Where eight or ten respectable witnesses can be found to speak of a man, in such terms as Kershaw is spoken of, it is not probable that his conduct can be so notoriously bad and immoral, or his heart so callous, as to be insensible to those parental affections, which induce a father to watch over the morals and welfare of his child.

The judgment of the Probate Court is, therefore, annulled; and ours is for the tutor, with costs in both courts.

Splane, for the petitioner.

W. C. Dwight, and *M. A. Fraser*, for the appellant.

JOHN D. DICKERSON V. MICHAEL GORDY.

Where plaintiff, who had been employed by defendant as a physician, sues for the value of his services, and defendant pleads that plaintiff was not licensed to practice, the burthen of proving that he was not so authorized will be on the defendant, he having employed the plaintiff as such.

Persons practising as physicians without having been licensed as required by law, can claim no compensation for their services.

Dickerson v. Gordy.

No action will lie on a contract the consideration of which is prohibited by law, or which originated in the violation of any statute. C. C. 1887, 1889.

APPEAL from the District Court of St. Mary, *Campbell, J.*

MORPHY, J. The petitioner seeks to recover \$1117 50, for medical services rendered to the family, and especially to the wife of the defendant. The latter excepted to the petition, as not containing an averment, that the plaintiff was a duly authorized physician. This exception having been overruled, the defendant pleaded the general issue, specially averring, that the plaintiff had no license to practice as a physician, and propounding to him interrogatories to ascertain whether he was a physician licensed by either of the Medical Boards of Louisiana, to practice within the State. Although ordered to answer these interrogatories, the petitioner failed so to do. The case was tried by a jury, who brought in a verdict of \$308 29, in favor of the plaintiff. Judgment having been entered accordingly, this appeal was taken by the defendant.

The defendant having employed the plaintiff as a physician, the burthen of proving that he was not legally authorized to practice, as such, rested on the former. 11 Mart. 21. To make such proof, he propounded interrogatories to him, from the plaintiff's failure to answer which, the fact of his having no license to practice physic must be taken as confessed. Code of Practice, art. 349. 7 La. 523. 10 La. 551. Our laws punish, with fine and imprisonment, any person who practices as a physician in this State, without having obtained a license so to do from one of the Medical Boards authorized to deliver licenses to that effect. B. & C.'s Dig. 672, 673. Persons practising as physicians without a license, can lawfully claim no remuneration for their services as such. There is no principle better settled, than that no action can lie on a contract, the consideration of which is prohibited by law. We cannot listen to a claim which originates in the violation of our statutes. Civil Code, arts. 1887, 1889. As, however, the plaintiff's failure to produce a license may have proceeded only from neglect, we will reserve to him his claim, if he can legally assert it, by rendering a judgment of nonsuit.

It is, therefore, ordered, that the judgment of the District Court

Derbes v. Décuir.

be reversed, and that there be judgment as in case of nonsuit, with costs in both courts.

W. C. Dwight, for the plaintiff.

Gibbon, for the appellant.

JEAN BAPTISTE DERBES v. EVARISTE DÉCUIR.

The testimony of a single witness, unsupported by corroborating circumstances, is insufficient to prove a contract, not reduced to writing, to pay a sum of money where the amount exceeds five hundred dollars. C. C. 2257.

Where a party to an action is ordered to answer in open court, interrogatories propounded to him by the opposite party, and the latter fails to have a day fixed for answering them, they cannot, on the failure of the former to answer, be taken for confessed. C. P. 351.

APPEAL from the District Court of St. Martin, *Boyce*, J.

T. H. Lewis and *W. B. Lewis*, for the appellant.

Voorhies, for the defendant.

MARTIN, J. The plaintiff is appellant from a judgment which rejects his claim against the defendant, on an alleged assumption of the latter of one-half of a sum due to the plaintiff by the defendant's father-in-law.

The general issue was pleaded. The counsel of the plaintiff and appellant urges, that evidence of the defendant's promise is found in the deposition of Césaire Delahoussaye; and results from his neglect to answer the interrogatory of the plaintiff in this respect.

As to the deposition of Delahoussaye, unsupported by corroborating circumstances, it is invalid, and affords no complete evidence, the demand being above the sum of five hundred dollars. The neglect to answer the interrogatory would have been sufficient, if the interrogatory had been required simply to be answered, but being required to be answered in open court, it was the duty of the plaintiff's counsel to call on the court to appoint a day for that purpose. This was not done. Code of Practice, art. 351. In 2 La. 73, we held, that "if a party be ruled to

Wilkins v. Bassett.

answer interrogatories in open court, and his opponent does not move for, and fix a certain day on which to answer, they will not be taken as confessed, if the party interrogated fail to answer."

The proof of the defendant's promise was clearly incomplete.

Judgment affirmed.

PATRICK M. WILKINS v. WILLIAM H. BASSETT.

A vendor who fails to comply with his obligation to release a mortgage on the property sold, and thereby impedes or prevents its resale, or subjects his vendee to unnecessary expense, or the title to doubt, will be responsible in damages.

APPEAL from the District Court of St. Landry, *Campbell, J.*

GARLAND, J. This action is brought to recover a balance due on three promissory notes, given by the defendant to Patrick M. Wilkins, to secure the price of certain real estate in the Parish of Lafayette, which the latter sold to the former. The defence is, that when the plaintiff sold the property, he warranted it to be free from all mortgages and claims whatever, yet that there was actually a mortgage on it at the time, for about \$3500, in favor of one Hathorn. This, the plaintiff by his warranty, was bound to erase and discharge, which he neglected or refused to do, for a long time, whereby the defendant was prevented from selling the property to advantage. The defendant avers, that he has sustained damages to the amount of \$3000, which he claims in re-convention.

It appears, that after the sale from Wilkins to Bassett, the latter sold the property to one Hamilton, and retained a mortgage on it. This purchaser not paying the price, Bassett took out an order of seizure against him, and under it, the property was offered for sale, and a bid of about \$2500 made for it, which was more than was owing by Bassett to Wilkins, but in consequence of the latter refusing or neglecting to raise the mortgage in favor of Hathorn, the Sheriff could not adjudicate the property, as the bid was not sufficient to cover that mortgage. Previous to this pro-

Wilkins v. Bassett.

ceeding, the attorney of Bassett applied to Wilkins to have this mortgage released, but it was not done. Subsequent to this, Wilkins took out an order of seizure and sale on his mortgage, to enforce the payment of the sum due on the notes annexed to the present petition. Under it, the Sheriff proceeded to offer the property for sale, but in consequence of the mortgage to Hathorn remaining on the records and being included in the certificate of mortgage, the Sheriff could not adjudicate it, as no bid could be obtained to an amount sufficient to cover it. In consequence of this difficulty the sale was postponed, and the property readvertised five or six times. The proceedings continued to drag on for more than a year, and the costs were swollen to a large sum; during which time different persons wished to purchase the property, and were willing to give as much as would have paid the debt, or more, if Wilkins would cause Hathorn's mortgage to be erased. Finally, the mortgage in favor of Hathorn's estate was released, and then in consequence, as it is alleged, of the doubts created and existing as to the title to the property, and the depreciation in its value, it sold for the sum of \$602, which left due the sum now claimed.

Whilst the proceedings above stated were pending, the Sheriff states, that he applied to Wilkins to have the mortgage in favor of Hathorn released, as it was the obstacle to a sale. Other witnesses say, that they applied to him about it, as they wished to purchase; and he must certainly have known the cause that prevented a sale under his own execution for more than a year. His neglect or pertinacious refusal to procure the release of this mortgage is remarkable, as it appears, that during the whole time, he had the evidence in his possession of its being discharged. Why he acted as he did, is not explained. By the terms of his warranty, he was bound to clear the property of all incumbrances, and he was not authorized upon any principle of law or justice, to keep a mortgage hanging over it, when it was in the market for sale, and it was the interest of the defendant to give a good title, and get a fair price. Nor had Wilkins the right to cause great and unnecessary delay in the sale, and thereby swell the costs to a sum equal to about one-half of what the property finally sold for.

Larochette v. Her Husband and others.

It is not a sufficient justification, that he finally procured the mortgage to Hathorn to be released. His long delay in having it erased, and the frequent exposures of the property for sale without effect, no doubt created strong impressions in the community against the validity of the title, which could not be removed by the lapse of a short time.

We cannot concur in the conclusions to which the jury and court below have arrived; but as there was a verdict for the plaintiff, and the evidence does not enable us to fix with precision the damages which the defendant is entitled to recover on his demand in reconvention, we think it proper to remand the cause, that another jury may assess them.

It is therefore ordered and decreed, that the verdict, and judgment rendered thereon, in the District Court, be annulled and reversed, and that the cause be remanded for a new trial; the plaintiff paying the costs of this appeal.

Swayzé and Taylor, for the plaintiff.

T. H. Lewis and W. B. Lewis, for the appellant.

CLARISSE LAROCLETTE v. HER HUSBAND and others.

A husband living with his wife in a house belonging to her, and attending with her to a retail shop kept in the same building, sold the contents of the shop to her in part payment of paraphernal funds received by him. *Held*, that these facts proved a sufficient delivery.

APPEAL from the District Court of St. Landry, *Boyce, J.*

MARTIN, J. The plaintiff is appellant from a judgment dissolving an injunction, which she had obtained to prevent the sale of property, sold to her by her husband, in order partly to discharge her claim for paraphernal property received by him. The property was attempted to be sold by the executors of Louallier, who are defendants, for the price of part of it purchased by her husband at the sale of the succession of their testator—their claim being founded on the vendor's privilege, and a judgment against the husband.

Larocette v. Her Husband and others.

Her pretensions were resisted on an allegation, that the judgment on which she had obtained a separation of goods from her husband, and on which her claim against him is based, was collusive and fraudulent, as well as the sale made to her by him, and that there had never been a delivery to her of the property thus sold. The record shows, that Antoine Carraby, her uncle, left her a legacy of two thousand dollars. Dupré swears that he received some money for her under the will of her uncle, and paid it to her husband. Labiche swears, that he remembers Dupré's paying to her husband a sum of money for the plaintiff, which he believes to have been one thousand dollars. This, in our opinion, repels the allegation of collusion and fraud in the judgment of separation, which settles her claim at one thousand dollars. This sum would have been paraphernal property and her private estate, even if a community of property had existed between her and her husband; but such community was clearly excluded by their marriage contract. It being clearly shown, that she was a creditor of her husband for one thousand dollars, nothing induces the slightest presumption of fraud in the sale made for her payment, it not being contended that the goods were of greater value. The husband and the wife dwelt in the same house, which was the property of the latter. The goods purchased were in that house, and both the husband and the wife attended to the retailing of them. It being shown that the goods had been bought by her, and were found in her house, and that they were sold sometimes by her, sometimes by her husband, it cannot be contended that they had not been delivered to her.

The court, in our opinion, erred in dissolving the injunction. It is therefore ordered, that the judgment be annulled and reversed, and that the injunction be made perpetual; and that the defendants pay the costs in both courts.

Swayzé and Taylor, for the appellant.

T. H. and W. B. Lewis, for the defendants.

Vanhille v. Her Husband and others.

ESTELLE GARRIGUES VANHILLE t. HER HUSBAND and others.

Neither the wife with her legal mortgage and privilege on the property of her husband, nor any other person holding a general or special mortgage, though entitled to be paid by preference out of the proceeds, can prevent an inferior mortgagee from causing the property subject to his mortgage to be sold. C. C. 3245, 3249. C. P. 710, 713, 714, 715. Under arts. 396, 401 and 403 of the Code of Practice, a third person may oppose the payment of the price to the seizing creditor, when he claims a preference on the proceeds, and the court may order the amount to be retained by the Sheriff subject to its order.

A wife cannot claim the proceeds of property sold at the suit of a creditor of her husband, or exercise her action of mortgage against property in the hands of a third person, if the latter prove that there is other property subject to her lien in possession of the husband, or since sold, which she is bound to discuss.

APPEAL from the District Court of St. Landry, *Campbell, J. Swayzé and Taylor*, for the appellant.

T. H. and W. B. Lewis and J. E. Morse, for the defendants.

SIMON, J. The only question which this case presents is, whether a married woman who sues her husband for a separation of property, can sue out an injunction to arrest the sale of property seized by the husband's creditors, upon which she claims to have a legal mortgage and privilege as a security for her dotal rights?

In this action, the plaintiff obtained an injunction which had the effect of preventing the sale of real property, seized by the husband's creditors. Those creditors were made parties defendant, and on their motion to dissolve the injunction, on the ground that it had been wrongfully and improperly sued out, the court below dissolved it; and from this judgment, the plaintiff has appealed.

It cannot be doubted, that a married woman, who, by virtue of arts. 2355 and 3287 of the Civil Code, has a legal mortgage on the property of her husband, and by virtue of arts. 3158 and 3182, has a privilege upon his personal effects, has no greater rights than any other person in whose favor the law grants a tacit and general mortgage and privilege. She can only enforce her rights in the manner pointed out by law; and the exercise of those rights cannot prejudice those which third persons have acquired, or may acquire, against the property of her husband, provided they do nothing to deprive her of, or in any manner to affect the

remedy to which she is entitled to resort for the recovery of her claims. A mortgage is a right granted to the creditor over the property of his debtor for the security of his debt, and permits him to have the property seized and sold, in default of payment. Civil Code, art. 3245. It is a legal right on the property, which can be followed into whatever hands the property passes; (Ib. art. 3249;) and the rank in which mortgages stand, with respect to each other, so as to be satisfied out of the proceeds of the sale of the property subject to them, is a subject too well understood to doubt that the law ever intended, that one creditor should be allowed to prevent another from exercising his rights upon the property of his debtor, by a sale thereof, although he should have a right to be paid by preference out of the proceeds thereof. Thus, in the case of *Casson v. The Louisiana State Bank*, 7 Mart. N. S. 281, this court held, that a party possessing a mortgage on property, has no right to prevent one having an inferior mortgage on the same property, from causing it to be sold. This is founded upon the principle, that a sale on execution does not extinguish pre-existing liens, entitled to a preference over the claim of the creditor, at whose suit the property is sold. 4 Mart. 398.

Now, a married woman who has a general mortgage upon the property of her husband, would perhaps have a right to be paid out of the proceeds of the sale thereof, in preference to any other subsequent creditor; but, as this court said in the case of *Gasquet v. Dimitry*, 9 La. 588, she cannot claim the proceeds of the sale of property sold at the suit of one of her husband's creditors, or exercise her action of mortgage against the property in the hands of a third person, if there be other property subject to her lien in the possession of the husband, or sold since, which she is bound to discuss.

Our law has provided for the sale of property subject to a general mortgage; and it is clear, that the existence of such a mortgage cannot prevent a sale of the property seized. Code of Practice, arts. 710, 713, 714, 715.

Under arts. 396, 401 and 403 of the Code of Practice, a third person may make opposition to the price being paid over to the seizing creditor, and may claim to regulate the effect of the seizure in what relates to him, when he contends, that he has a right

Flaujac v. Her Husband and others.

of preference on the proceeds of the thing seized and sold. In such a case, the court may direct the Sheriff to retain in his hands, subject to its further order, the proceeds of the sale. But the law has no where permitted a mortgage creditor, or any other, to arrest the sale of the property seized, when the opposition is founded upon a mere right of preference upon its proceeds. This should be regulated after the sale, and not before; and even in a case like this, the plaintiff could not sustain her opposition, if the seizing creditor prove that the defendant has other property of sufficient value to satisfy the claim of the third opponent. Code of Practice, art. 403.

With this view of the question, it seems to us clear, that the injunction was wrongfully sued out.

Judgment affirmed.

CLARISSE FLAUJAC v. HER HUSBAND and another.

APPEAL from the District Court of St. Landry, *Campbell, J. Swayzé and Taylor*, for the appellant.

T. H. and W. B. Lewis, for the defendants.

SIMON, J. This case presents the same question as just now decided, between *Estelle Garrigues Vanhille, and Her Husband and others*, and it must have the same result.

Judgment affirmed.

Hudson v. Grout.

WILLIAM HUDSON v. JAMES J. GROUT.

The owner of a slave, hired to another and drowned while employed, with the consent of his master, in a work not proved to have been of a dangerous character, cannot recover his value.

APPEAL from the District Court of St. Mary, *Campbell, J.*

Voorhies, Heard, and Splane, for the appellant.

W. C. Dwight and Magill, for the defendant.

MARTIN, J. The plaintiff is appellant from a judgment rejecting his claim for the value of a slave lent to the defendant, who employed him in a dangerous work, to wit, in taking to pieces a steamboat sunk in the river, in doing which the slave was drowned. It does not appear to us, that the court erred. The evidence shows, that the slave was not loaned; the defendant having asked the use of him, on a promise to send one of his slaves to work for the plaintiff, for a period of time equal to that during which he employed the slave of the plaintiff, a circumstance which is admitted by the plaintiff. The bailment was not therefore on a loan, which is essentially gratuitous. The evidence also shows, that the plaintiff permitted his negro to go, although apprised of, and well knowing at the time he sent him, the kind of work the defendant intended to employ him in. His counsel further urges, that the person engaged by the plaintiff to superintend the taking the boat to pieces, was not competent for that purpose. This is not proved; and the witnesses generally agree, that the work the slave was employed in, was not a dangerous one.

Judgment affirmed.

Maskell, Executor, v. Roussel.

THOMAS MASKELL, Testamentary Executor of John W. Dough, deceased, v. PIÉRRÉ BERTIN ROUSSEL.

Neither the validity of a will under which a plaintiff holds the appointment of testamentary executor, nor the certificate of his appointment from the Court of Probates, can be inquired into collaterally, in a controversy between the executor and a debtor of the succession represented by him. The court cannot look beyond the certificate of his appointment, or letters testamentary; and until the will be regularly annulled, which cannot be done in the absence of those having an interest under it, he will be entitled to exercise the powers conferred on him by law.

APPEAL from the District Court of St. Mary, *Campbell, J.*

SIMON, J. The defendant is appellant from a judgment which condemns him to pay to the plaintiff, as testamentary executor of the estate of John W. Dough, deceased, the sum of \$1500, with ten per cent interest, per annum, on \$7500, from the 15th of December, 1841, until paid.

The claim is first resisted on the ground, that the plaintiff is not the testamentary executor of the last will and testament of the deceased, and has no right to administer on the estate. The answer states, further, that the note sued on, was given in part consideration of the price of certain property, consisting in town lots with the improvements thereon, sold to the defendant by the deceased, belonging to the community formerly existing between the deceased and his late wife; that the same was so sold after the dissolution of the community; that the deceased had no right to sell; and that a suit has been instituted by one Tarkington for the portion of the property that is due by the estates of John and Nancy Dough to the latter. He further alleges, that the instrument under which the plaintiff pretends to act as testamentary executor, is not one by which a testamentary executor can be appointed; that one John B. Murphy is the only legal testamentary executor to whom payment can be made; and that the sale made to him by Dough, being illegal, may be set aside and annulled, and he, the defendant, evicted from the property by the heirs of the wife of the deceased, or by the curator of her estate, as a suit has already been brought for that purpose.

It is first proper to notice, with regard to the alleged danger of eviction, that the evidence shows, that in attacking the sales made by John W. Dough after the death of his wife, Tarkington expects the sale made to the defendant. This sale appears to be ratified by Tarkington in his petition, and it is clear, that so far as the action of Tarkington is in question, the defendant is not in danger of being evicted.

On the main ground of defence, an attempt has been made to establish the illegality, or invalidity of the instrument under which the plaintiff has been confirmed, as testamentary executor of the last will of the vendor, and to show, that the instrument being null and void as a will, another person is the only legal testamentary executor entitled to institute the present suit. This was disregarded by the lower court, and, we think, very properly. The plaintiff was regularly confirmed by the Court of Probates, as testamentary executor; letters testamentary were delivered to him; and those letters were regularly produced, on the trial of this cause. This was clearly sufficient to authorize the plaintiff to maintain this action; and, as we have often held, we cannot look beyond the certificate of his appointment, or letters testamentary, in a controversy between the executor acting in that capacity, and one of the debtors of the succession which he represents. It cannot, in our opinion, be controverted, that the validity of the will under which the plaintiff holds his appointment, cannot be inquired into collaterally, in a proceeding with a debtor of the estate, who has no interest in the succession; that until the will be regularly annulled, the testamentary executor has a right to exercise the powers conferred upon him by law, and by the effect of his confirmation; and that it does not lie in the mouth of the defendant to contend, that the letters testamentary, under which the plaintiff acts, were illegally issued. It is obvious, that this controversy is an indirect attempt to annul the will of the deceased, under which the plaintiff was appointed executor. This cannot be done in this suit; nor can its validity be inquired into, in the absence of those having an interest under it. 6 La. 53.

Having thus disposed of the principal ground of defence set up by the defendant, there remains the question of interest. Under

Maskell, Executor, v. Roussel

the contract of sale filed with the plaintiff's petition, it is stipulated between the parties, that the notes shall bear an interest of ten per cent per annum from their date until paid, and that the interest on all the notes (five in number, of \$1500 each,) given for the price of the property, shall be paid *annually*, and the same endorsed to the credit of said interest, on the back of said notes. This clearly gives to the plaintiff, the right of claiming the interest of one year, on the whole amount of the price, as one year's interest was due at the time this suit was instituted; but the judgment of the lower court should have been limited to one year's interest, upon the four last notes, and should only have allowed interest at the rate of ten per cent from the 15th of December, 1841, *until paid*, on the note sued on, which became due on the 15th of December, 1842. The interest upon the other four notes was only due until the latter period.*

It is therefore ordered, that the judgment of the District Court be affirmed, with the following modifications: That the plaintiff recover of the defendant the sum of \$1500, with ten per cent interest per annum thereon, from the 15th of December, 1841, until paid; and the further sum of \$600, being one year's interest up to the 15th of December, 1842, on the four other notes mentioned in the act of sale; and that no execution issue against the defendant, for the said sum of \$600, unless the said four notes be deposited in the Clerk's office, for the purpose of endorsing to the credit of said interest on the back of said notes, the amount which may be paid by the defendant, or made out of his property, in satisfaction of this judgment: and it is also ordered and decreed, that the costs in the lower court be paid by the defendant, those in this court to be borne by the plaintiff and appellee.

Maskell, for the plaintiff.

Splane and Stewart, for the appellant.

* The sale was made for \$7500, payable in five equal instalments at one, two, three, four, and five years, the first note falling due the 15th of December, 1842, and the others annually thereafter; the notes to bear interest at ten per cent a year from the 15th of December, 1841. There was also a stipulation, that the interest on all the notes should be paid annually.

Succession of John W. Dough — Murphy, Appellant.

SUCCESSION OF JOHN W. DOUGH — JOHN B. MURPHY, Appellant.

In an instrument signed by the deceased and another, offered for probate as a nuncupative will by public act, the notary, after stating that the act was executed by him as dictated by the testator, in the presence of the witnesses required by law, added: "The parties dispense with the certificate required by art. 3328 of the Civil Code, and exonerate me, said notary, from all liability on account of the non-production of the same. All of which was done without interruption, and without turning aside to other acts." &c. *Held*, that the instrument is invalid as a nuncupative will by public act; that the stipulation relative to exonerating the officer from all liability in consequence of not producing the certificate required by law, is a matter *inter vivos*, foreign to dispositions *mortis causa*, having nothing to do with the formalities of the will; and that its introduction was a turning aside to another act, and an interruption of the formalities, which, were consequently not fulfilled at one time, as required by art. 1571 of the Civil Code.

APPEAL from the Court of Probates of St Mary, Dumartrait, J.

SIMON, J. This is a contest between two persons, who respectively pretend to be entitled to the testamentary executorship of the last will of John W. Dough, deceased.

John B. Murphy made application to the court, *a qua*, to be confirmed as testamentary executor, by virtue of an olographic will of the deceased, dated the 18th of March, 1842. This will is in due form, and has been ordered to be executed.

To this application, Thomas Maskell, who had been previously confirmed as executor in an *ex parte* proceeding, and to whom letters testamentary had been delivered, made opposition, pretending that the appointment of Murphy would be illegal, and that he, Maskell, should be maintained in his appointment. His pretensions are founded upon an instrument dated the 14th of May, 1842, purporting to be a power of attorney, with the most extensive powers for the administration of his affairs, given by John W. Dough to Thomas Maskell, containing also, stipulations relative to a mortgage given by the deceased upon his property, in favor of said Maskell, and in case of death of the said Dough, "appointing said Maskell testamentary executor of his estate, with full seisin thereof." This instrument is signed by both parties, and is closed as follows: "This act was executed by me, as dictated by

Succession of John W. Dough—Murphy, Appellant.

said John W. Dough, and in presence of Joshua Baker, Stephen Duncan, and Pierre Picot, all three competent witnesses, above the age of majority, and residing in this parish, after the same had been read by me in presence of the parties and said witnesses. The parties dispense with the certificate required by art. 3328 of the Civil Code of this State, and exonerate me, said Judge, from all liability on account of the non-production of the same. All of which was done without interruption, and without turning aside to other acts, in Franklin, in the Parish and State aforesaid, on this 14th day of May, A. D. 1842, and signed by said parties, said witnesses, and me, said Judge, after due reading.

The Judge, *a quo*, considering that this instrument was made in due form as a nuncupative testament by public act, and should have the effect of revoking that portion of the olographic will of the deceased, by which John B. Murphy is appointed his testamentary executor, rejected said Murphy's application, and maintained Thomas Maskell in his former appointment and confirmation. From this judgment, John B. Murphy has appealed.

The instrument under which the appellee was appointed and confirmed testamentary executor of the last will of the deceased, appears to have been executed exclusively in relation to matters *inter vivos*. It contains no disposition *causa mortis*, except, that after the stipulation that the powers therein conferred *shall not be revoked by death or otherwise*, and that the claims therein secured by mortgage, shall not be enforced during the lifetime of the debtor, said debtor appoints his mortgage creditor and attorney in fact, the testamentary executor of his estate. This is immediately followed by the declaration of the Judge above recited, so as to give to the act the character of a will; but it contains, in our opinion, a fatal defect, which alone is sufficient to destroy its validity as a nuncupative testament by public act.

One of the rules which must be strictly observed in the execution of nuncupative testaments by public act, is, that *all the formalities should be fulfilled at one time, without interruption, and without turning aside to other acts*. Civil Code, art. 1571. Here, the act itself shows that between the written declaration of the notary, that "the act was executed as dictated, &c," and the subsequent declaration that "it was done without interruption," &c., and

Succession of John W. Dough — Murphy, Appellant.

signatures of the parties and witnesses, the Judge and the parties *turned aside* to another act, that is to say, to a matter *inter vivos*, entirely foreign to dispositions *causa mortis*. This matter or stipulation, related to exonerating the Judge from all liability resulting from his not producing the certificate required by law, in the execution of acts of mortgage. This had clearly nothing to do with the formalities of the will; those formalities were not fulfilled *at one time*; they were interrupted, and were only continued after the subject matter of the stipulation had been provided for, agreed on between the parties, and written by the Judge in conformity to their agreement. The subsequent declaration of the Judge, that the act was done without interruption, and without turning aside to other acts, cannot cure the defect, for it appears on the face of the instrument itself; and is such, in our opinion, as to make us feel no hesitation in declaring the act null and void, as a nuncupative testament by public act. No effect as such, should have been given to it below, and we think the Judge, *a quo*, erred in not appointing and confirming the appellant as the only testamentary executor of the last will of John W. Dough, deceased, and in not revoking or annulling the letters testamentary previously delivered to the appellee.

It is, therefore, ordered, that the judgment of the Court of Probates be annulled and reversed; and it is ordered, that the former confirmation of Thomas Maskell, as testamentary executor of John W. Dough, deceased, be rescinded and annulled; that John B. Murphy be confirmed in his appointment as such testamentary executor, under the olographic will of the deceased; that he be sworn as such, and that letters testamentary be delivered to him accordingly. It is further ordered, that the costs in both courts be paid by the succession.

Splane and J. P. Conrad, for the appellant.

Maskell, pro se.

 Garrard, Executor and others, v. Reed.

CUTHBERT B. GARRARD, Executor of the last will of William Garrard, deceased, and others, Heirs v. WILLIAM REED.

A judgment having been obtained by the United States in a District Court of the United States, against plaintiffs' testator in his lifetime, an execution was issued after his death, without any steps having been taken to revive the suit, under which property was sold by the Marshal, and purchased by defendant. In an action before a State court, by the representatives of the deceased against the purchaser, for the property: *Held*, that the act of Congress of 26th May, 1824, regulating the mode of practice in the Courts of the United States in Louisiana, having provided that it shall be conformable to the laws directing the mode of practice in the District Courts of the State, the United States had no right to execute their judgment without having instituted proceedings to revive it; and that the State court had jurisdiction to look into the proceedings of the executive officer subsequent to the judgment, to ascertain between citizens of the State, what rights had been taken from the one and given to the other. Judgment for the plaintiffs.

APPEAL from the District Court of St. Landry, *Boyce, J.*

T. H. Lewis, for the plaintiffs.

Splane, for the appellant. The court is without jurisdiction.

Wayman v. Southard, 10 Wheaton, 1. *United States v. Peters*, 5 Cranch, 115. *McKim v. Voorhies*, 7 lb. 279. 2 Wheaton, 1. 7 Martin, 436. 1 Wheaton, 305. 5 lb. 1. 1 Kent's Comm. 385.

GARLAND, J. The facts of this case are these: In the month of March, 1838, the United States of America recovered a judgment in their District Court, for the Western District of Louisiana, against William Garrard, for a large sum. In the month of November of that year, Garrard made his will, appointed an executor, who is one of the plaintiffs, and died in the parish of St. Landry. Shortly after the death of Garrard, his executor presented the will for probate to the competent and proper tribunal; it was probated, and the executor assumed the functions of his office, and took into possession the property composing the succession, and was proceeding to administer it. In the month of April, 1839, without any step or motion to revive, or make executory the aforesaid judgment, an execution was issued against the dead man, and a number of slaves were seized under it, and sold without appraisement, for cash, by the Marshal of the United States. On the day of sale, the attorneys of the heirs and the

Garrard, Executor and others, v. Reed.

executor gave notice to the Marshal and to those present, of the alleged irregularities and illegal proceedings, and forbade all persons to purchase. Notwithstanding such notice and warning, the slaves were bid for and adjudicated to the defendant, and this suit is brought to recover them, with their hire from him.

The defendant excepted to the jurisdiction of the inferior court, alleging that it was not competent to examine into the subject matter. This exception was overruled, and the defendant answered by a general denial. He further pleaded, that he had purchased the slaves at a sale made by the Marshal of the United States, under the execution before mentioned, which sale was formal and legal.

There was a judgment in favor of the plaintiffs, from which the defendant has appealed.

The principal reliance of the appellant in this court, is on his exception to the jurisdiction of the inferior tribunal. He contends, that the constitution gives to Congress the exclusive authority to regulate the proceedings in the Courts of the United States, and that the State tribunals have no power to control them, nor can they arrest their judgments, or determine the extent of their jurisdiction.

It is not our purpose to enter into a discussion of these principles, to which it is possible we might assent, as we conceive them inapplicable to the case before us. It is not necessary, nor do we intend to examine in any way, the judgment rendered by the United States Court against Garrard. It is sufficient that we look into the proceedings of the executive officer, subsequent to the judgment, with a view to ascertain, as between citizens of the State, what rights have been taken from one, and conferred on the other. In this point of view, we have not a doubt of the jurisdiction of the inferior court. We suppose it will not be seriously contended, that because one of the parties derives his right or claims to property from a sale made by a Marshal of the United States, that the Federal courts are necessarily invested with jurisdiction. We may suppose that sale, or those proceedings, a remote link in a chain of title; and if the doctrine contended for be correct, the State court must stop, and take for granted their regu-

Garrard, Executor and others, v. Reed.

larity and legality, or say to the parties, that they must seek relief in the Courts of the United States.

As to the nullity of the execution under which the Marshal acted, and the illegality of his proceedings, we have no doubt. After the death of the defendant Garrard, the attorney of the United States had no more right to proceed to the execution of the judgment obtained, without legal proceedings to revive it and give it effect, than he would have had to proceed with the trial, and obtain a judgment, if the defendant had died pending the suit, and no step had been taken to make the executor or legal representatives parties. No judicial proceeding can be carried on in the name of a dead man, nor can the property he leaves be taken from his heirs or legal representatives, without proceeding against them as directed by law. The United States have a priority in many cases, to secure the payment of debts owing them; but we are yet to learn, that they are exempted from the ordinary forms of judicial proceedings in enforcing their payment. When the execution under which the Marshal acted was issued, Garrard was dead. It is not pretended that the executor, who had the property in possession, and was administering it under the authority of the Court of Probates, was previously notified or made a party to the suit; nor was he ordered by any legal authority to pay the debt claimed.

By an act passed on the 26th May, 1824, Congress directed that the mode of proceeding in civil causes in the Courts of the United States in Louisiana, should conform to the laws regulating the mode of practice in the District Courts of the State. Acts 1824, p. 115. Some difficulty has occurred as to the proper construction of this act; and whether the rules of practice since made by the Legislature are to be enforced; but with that we having nothing to do, as the proceedings of the Marshal were in violation of the laws in force on the 26th May, 1824, as well as those made subsequently.

The fallacy of those who directed the proceedings in question, was in considering themselves as vested with judicial authority and released from all legal restraints.

Judgment affirmed.

*Kuykendall v. Burnley.***BENJAMIN KUYKENDALL V. HARDIN BURNLEY.****APPEAL** from the District Court of St. Martin, *Boyce, J.***T. H. Lewis**, for the plaintiff.**Voorhies**, for the appellant.

MORPHY, J. The plaintiff claims \$1341 57½, for work and labor done on a gin-house, gin and mill, and cotton press, and for other work as set forth in an account annexed to his petition. The defence is, that the work which plaintiff did, or caused to be done, is so bad and defective, that the greater portion of it, if not all, will have to be taken to pieces and put up entirely anew; that the plaintiff moreover failed to complete, finish, and deliver said work or job within the time stipulated in his contract; that, in consequence thereof, the defendant was deprived of the use of his gin until the ginning season was nearly expired; that had the plaintiff complied with his contract, the defendant would have been able to gin the cotton crops of several of his neighbors who had applied to him for that purpose, and would have thereby realized profits of which he has been deprived; that the failure of the plaintiff to comply with his contract, was also the cause of the defendant's being compelled to ship his crop to market at a late period of the season, when cotton had much depreciated in value, and has caused him damages in the sum of \$1200, which amount is claimed in reconvention. There was a judgment below in favor of the plaintiff, for \$746 87½. The defendant has appealed.

There is no evidence of any specific damage sustained by the defendant, by reason of the delay which occurred in the performance of the work, which was completed only in February, when it should have been delivered in November preceding. As to the manner in which it was executed, a great number of witnesses were examined. Their testimony shows, that it was defective in many material respects, and that the gin-house would have to be taken down, and put up anew. The charge for building it was therefore, entirely rejected by the Judge below, who made various other deductions. Upon an examination of the evidence, we

Fanchonette v. Grangé.

are of opinion, that the result at which he arrived is not so clearly erroneous as to make it our duty to reverse the judgment appealed from.

Judgment affirmed.

MARIE FANCHONETTE v. LOUIS GRANGÉ.

The assent of a Police Jury to the emancipation of a slave, is not an ordinance requiring the signatures of the President and Clerk on the journal to give it validity, in the meaning of the seventh section of the act of 20 March, 1816, relative to the organization and powers of police juries.

It is not essential to the validity of the acts of a Police Jury that the daily journal should be attested by the president and secretary. The 7th sect. of the act of 20 March, 1816, is directory to the officers of such bodies, and their neglects of duty cannot be allowed to prejudice persons having no power to control or direct them.

The assent of a Police Jury is only necessary to the emancipation of a slave, when under thirty years of age. Act 31 January, 1837. Such assent when the slave is thirty years of age, is only necessary to relieve the master from giving bond to remove the slave so emancipated out of the State within one month. Acts of 16 March, 1830, and 25 March, 1831.

Against a mere trespasser without right, a plaintiff need only show a *prima facie* title.

APPEAL from the District Court of Lafayette, *Campbell, J.*

J. E. Morse, for the plaintiff, cited the Civil Code, arts. 234, 235, 2247, 2248. 5 Mart. 405. *Tate v. Penne*, 7 Mart. N. S. 548. *Montreuil et al. v. Pierre*, 9 La. 356.

Voorhies, for the appellant.

GARLAND, J. The plaintiff, representing herself to be a free woman of color, avers, that since her emancipation by Laurent Grangé, she has had a child named John, who, of right, is free, and that she is entitled to the possession of him, he being about four years old. She states, that the defendant has taken possession of said boy, and forcibly detains him. She claims the possession of him, and prays, that he be declared free, and that the defendant be condemned to pay her \$1000 damages.

The defendant denies generally, all the allegations in the pe-

Fanchonette v. Grangé.

tion. He avers, that the plaintiff was born a slave, and has never been legally emancipated.

The plaintiff has satisfactorily proved, that she is the mother of the child, which is now between four and five years old. To prove her own freedom, she offered as evidence, a copy of an act purporting to have been passed by Laurent Grangé, her former master, before the late Thomas B. Brashear, Parish Judge of Lafayette. It is dated the 6th of August, 1836, and the copy is certified in due form on the 23d of October, of the same year. It is a full and regular act of emancipation, and from the copy, it would appear, that the original was executed in a complete, full, and legal manner. The plaintiff also offered an advertisement, made by the Sheriff of the parish, of the application to emancipate her, which was published for more than forty days, in a newspaper published in the town where the Court House is situated, in the French and English languages. She also offered the record book or journal of the Police Jury of the parish, showing the assent of that body to her emancipation; and a copy from it is in the record. The proceedings of the Police Jury appear to have been published for several weeks in the same newspaper.

The defendant offered the present Parish Judge as a witness. He says, that he "has carefully examined his office, and finds no other act of emancipation of the slave Fanchonette, than the one produced by him in court." The record states, that an original act was produced, and that leave was given to file a copy, but we find none on file. The Judge says, that when he took possession of the office, it was in great confusion. He does not know that any originals have been lost, but knows that several persons have called for acts that cannot be found. It is admitted, that the body of the act produced by the present Parish Judge, is in the handwriting of the late Judge Brashear.

There was a judgment in favor of the plaintiff, and the defendant has appealed.

Our attention has been first directed to a bill of exceptions, taken by the defendant, to the opinion of the court below, admitting as evidence the record book of the proceedings of the Police Jury, showing their assent to the emancipation of the plaintiff by her late master. The objection is based on the fact, that the re-

cord or journal of that particular meeting is not signed by the president and secretary of the jury. The counsel relies on the seventh section of the act of March 20, 1816, to sustain his objection, (B. & C.'s Dig. 643, No. 18,) which provides, that the presidents of the Police Juries shall sign, and the clerks thereof attest, all ordinances made, and that the former shall see them properly promulgated, &c. We are not prepared to say, that the assent given to the emancipation of the plaintiff, is such an ordinance as requires the signatures of the president and clerk, on the journal of the jury. The evidence of that assent, when given in conformity to the act of March 24, 1827, (B. & C.'s Dig. 429, No. 11,) was probably duly attested. We are not aware, that it is more necessary to give validity to the acts of a Police Jury, that their daily journal should be attested by the president and secretary, than it is that the journals of the Senate and House of Representatives should be so signed. The law requires the ordinances of the jury to be signed, as the constitution requires the acts of the Legislature. The statute is directory to the officers of the Police Jury, and their omissions of duty cannot prejudice persons incapable of controlling or directing them. At any rate, the objection seems to go more to the effect of the proceedings of the jury, than to their admissibility. We are, therefore, of opinion, that the Judge did not err in admitting the record book of the proceedings of the Police Jury in evidence.

The counsel for the defendant has commented at some length upon the assent of the Police Jury, and he contends, that it does not sustain the plaintiff's case. As between the plaintiff and defendant, we regard the assent of the Police Jury of no weight. The evidence shows, that the plaintiff was more than thirty years of age at the time, and the assent of the jury was not necessary to her emancipation. It was only necessary to enable her to remain in the State after emancipation, and to relieve her master from giving a bond to remove her in one month. The assent of the Police Jury to an act of emancipation, *per se*, is only requisite where the slave is under thirty years of age. B. & C.'s Dig. 429, 430. The defendant has no right to avail himself of the requisites which the Legislature have imposed for public purposes.

But the principal reliance of the counsel for the defendant is,

Léger v. Arcenaux and another.

that the copy of the authentic act offered as evidence is false, there being no original in existence. In assuming this ground, the counsel takes upon himself to impugn the faith and confidence due to the official act and certificate of a very important and responsible functionary. He insists, that there is no original of the copy offered. To prove this, the present Parish Judge testifies that here is no other act of emancipation of the plaintiff in his office than the one produced by him, which act is not before us; and the Judge does not say that it is different from the copy. We are bound to presume the officer accused has acted correctly, until there is evidence to the contrary.

In this case, the defendant has no right to complain of being held to the most rigid rules of evidence and law. He has wrested from the possession of a mother her young child. He sets up no title to it in himself, as derived from any source, but relies, in a question of personal liberty, upon technical objections, and the omissions of public officers, to defeat the action of the plaintiff. We have, on different occasions, said, that against a trespasser without right, a plaintiff need only show a *prima facie* title or right; and in this case, we think the duly certified copy of the act of emancipation, standing as it does without sufficient evidence to impeach its validity, enables the plaintiff to maintain the judgment of the lower court.

Judgment affirmed.

MICHEL LÉGER v. PIERRE SOSTHENE ARCENAU and another.

Where a debtor has made a *cessio bonorum*, all his debts, whether payable then or at a future period, are placed on the same footing, the latter being reduced in proportion to the distance of the day of payment. All the creditors, including those whose debts were payable at a future time, are entitled to a voice in fixing the terms of sale; nor will the consent of a creditor to the sale of the property on a credit, be considered an extension of the time of payment, so as to release others bound with the insolvent as endorsers or sureties.

APPEAL from the District Court of Lafayette, *Boyce, J.*

VOL. V.

65

MARTIN, J. The defendants being sued on a note by which they bound themselves, *in solido*, with Louis Sosthene Arcenaux, deceased, resist the claim on the ground that the plaintiff had, without their consent, granted a prolongation of time to the said Louis Sosthene Arcenaux, who was the principal debtor; and thus discharged the present defendants, who signed the note as sureties. The judgment was against them, and they have appealed.

The record shows, that Louis S. Arcenaux made a *cessio bonorum*; that the plaintiff had an attorney, who attended for him the meeting of the creditors called to fix the terms of sale of the property ceded; and that they unanimously agreed, without any opposition from, and with the assent of, the plaintiff's attorney, that the sale should be at one and two years; and this is the only fact which the defendants present as evidence of a prolongation of the time of payment.

It does not appear to us, that the Judge erred. On a cession of goods, all the debts of the insolvent, whether payable then or at future periods, are placed on the same footing, the latter being reduced in amount, in proportion to the distance of the day of payment.

The claims of the creditors are, therefore, no longer on the debtor, but on the nett proceeds of the sale of the property ceded. In the terms of sale, all the creditors are entitled to vote, as well those whose debts are payable at the time of the cession, as those whose debts are payable at subsequent periods. All are interested that the largest produce should be obtained. If the defendants should choose to pay the debt, they will be subrogated, *ipso facto*, to the rights of the creditor on the proceeds of the sale. He was not bound to insist on the ceded goods being sold for cash. This probably would have been injurious to all the creditors, and to the defendants among them.

The plaintiff has prayed us to amend the judgment in his favor, in relation to the date from which the interest is to commence. The error seems to be a clerical one. The note specifies, that the interest shall commence on the 11th day of October, in the year 1838; in the judgment, it runs from the 11th day of October in

Kohn and others v. Miller and another, Syndics.

the year, 1842. The plaintiff is entitled to have his judgment amended, as prayed for.

It is, therefore, ordered and decreed, that the judgment in favor of the plaintiff be amended, by allowing the interest on his claim to commence on the 11th day of the month of October in the year 1838; and that in all other respects it be affirmed, the defendants paying the costs.

Neveu, for the plaintiff.

T. H. and W. B. Lewis, and *Voorhies*, for the appellants.

JOACHIM KOHN and others v. JOHN F. MILLER and another, Syndics of the creditors of said John F. Miller, an Insolvent.

APPEAL from the District Court of St. Martin, *Boyce*, J.

Voorhies, for the plaintiffs.

Magill, for the appellants.

MORPHY, J. This action is brought on an open account for advances of money, commissions, and interest, articles of clothing, provisions, &c., furnished by the plaintiffs, as commission merchants, or factors to Jonas Marsh, and John F. Miller, as joint partners in a certain sugar plantation and slaves in the parish of St. Martin, from the beginning of 1838, up to 31st of August, 1841. A number of letters, drafts, and other vouchers were produced in support of this account, and a long string of interrogatories propounded touching a great many items in it, and an alleged agreement of the defendants, to pay ten per cent per annum on all advances made for them by the petitioners. These interrogatories were answered by Jonas Marsh, but John F. Miller, to whom they were also put, as being one of the syndics of his own estate, allowed the facts sought to be proved to be taken, *pro confesso*, by his neglect to make any answer. Judgment was accordingly entered up against the syndics for \$4288 07, with interest at ten per cent per annum from the 31st of August, 1841,

Dauterive and another v. Broussard and others.

until paid, that sum being one-half of the amount claimed of Jonas Marsh & Co. The syndics have appealed.

This case has been submitted to us without argument, and without any points having been made by either of the parties. The only doubt which has occurred to us is, whether the insolvent can, by the course pursued, be made a witness in favor of the plaintiffs, when he could not testify in a contest between them and his other creditors? If, however, the latter have thought proper to select him as their syndic, the reason for the exclusion of his testimony, which is a presumption of fraud and collusion, is greatly diminished, if not entirely removed, by such a mark of confidence in him on their part; and we can see no good reason why the plaintiffs should not have the right to propound to him interrogatories on matters within his personal knowledge, as to a party acting in his own right. What effect such a judgment would have against the other creditors, if disputed on a tableau of distribution, we are not called upon to decide. Under this view of the matter, we think, that the Judge, *a quo*, decided correctly.

Judgment affirmed.

ANTOINE B. DAUTERIVE and another v. DRAUZIN BROUSSARD and others.

A stake-holder who pays over the amount bet on a horse-race, without the sanction of a majority of the judges of the race, will be responsible to the winner.

APPEAL by the plaintiffs from the District Court of St. Martin, *Boyce, J.*

GARLAND J. This suit is brought to recover the sum of \$400, which the plaintiffs and A. and B. Roméro bet on a horse-race, and staked in the hands of Broussard, who was one of the judges. The plaintiffs contended that they won the race, and that Broussard improperly delivered the money to A. and B. Roméro. The facts are these:—The parties agreed to run a race. The

Dauterive and another v. Broussard and others.

paths were straight and parallel to each other, some twelve or fifteen feet apart, with grass and weeds between. Miner, a witness, testifies, that it was agreed "that if either horse left his track, and interfered with the other horse, he should lose the race." A. and B. Roméro aver that the agreement was, if either horse left his track, he should lose the race; but no witness swears to this fact. It appears, that both horses left their respective tracks. That of the plaintiffs' first left his path and run upon the space between the paths, but before he got very near to the path of the other, the latter, also broke on the outside, and so continued to the end of the race. Some of the witnesses say, that the plaintiffs' horse came out on the space between the paths. Others say, that he was in the path of the Roméros' horse; and one, who furnishes a diagram to explain his testimony, says, that neither horse was in the paths, but that they came out between the judges. The horse of A. and B. Roméro, it appears, had about twelve feet advantage at the start, and the plaintiffs' came out from seven to ten feet ahead. Each party had two judges. Broussard was selected by the Roméros, and he and his colleague decided, that they had won the race, the other two judges not concurring, and declining to give an opinion; whereupon he (Broussard,) gave up the money, contrary to the will of the plaintiffs. The evidence does not satisfy us that the plaintiffs' horse by leaving his track, in any manner interfered with the other. It is not shown that it caused the latter to leave his track, or that it impeded his speed, or otherwise affected his running. The weight of testimony is in favor of the plaintiffs' horse being ahead, when that of the Roméros left his path.

The agreement is not shown to have been that the horse which should first quit his track, should lose the race, but that the one so doing, and interfering with the other, should lose. No interference is proved; and as it is not denied that the plaintiffs' horse was behind at the starting point, and ahead at the termination of the course, we think the Judge below erred in giving a judgment for the defendants.

The defendant, Broussard, contends that he was a stake-holder, and that having paid over the money, in obedience to the decision of the judges, he is not responsible to the plaintiffs. If it were

Marsh v. Smith.

true, that the money had been paid in obedience to the decision of all, or of a majority of the judges, this defence would avail ; but that is not shown. On the contrary, it appears that the two judges selected by the Roméros only were of opinion that they had won, and Broussard was one of them. It further appears, that he said to a witness, that he held himself responsible if there should be any difficulty about the matter.

It is, therefore, ordered and decreed, that the judgment of the District Court be annulled, and that the plaintiffs, Dauterive and Carlin, recover of Antoine Roméro and Balthasar Roméro, as joint obligors, the sum of four hundred dollars, with legal interest from judicial demand, to wit, from the 18th day of the month of October, in the year 1842 ; but in case the aforesaid sum and interest cannot be collected from the said Roméros, it is further ordered and decreed, that the plaintiffs have judgment against Drauzin Broussard, for the said sum of four hundred dollars, with legal interest from the aforesaid date. The defendants to pay the costs in both courts.

Magill, for the appellants.

Voorhies, for the defendants.

JOHN C. MARSH V. BOYD SMITH.

One who stands by in silence, while his own property is sold, and suffers another to become the purchaser, will be estopped from disputing a title so acquired.

APPEAL from the District Court of St. Mary, *Wilson, J.*

Maskell, T. H. Lewis, and W. B. Lewis, for the appellant.

J. E. Morse and Voorhies, for the defendant.

A. Porter, for the parties cited in warranty.

BULLARD, J. This is a petitory action in which the plaintiff claims title to a tract of land in the parish of St. Mary, at a place called *Les Côtes*, or *Isles de la Petite Anse*, surrounding other tracts of land belonging to different persons, and divided into several small tracts so as to contain together about five hundred and

Marsh v. Smith.

fifty-two acres, granted originally to Jacques Fontennette and Alexandre Bienvenu De Vince, and confirmed to the grantees by the United States. He derives his title to this tract of land through several mesne conveyances from the grantees, alleging that Fontennette, on the 3d of April, 1810, sold his share to John and David Hayse, who, in 1814, sold to Jesse McCall, and that the latter afterwards transferred the same to Stone and himself (Marsh,) and that he afterwards acquired the title of his deceased partner. That in the meantime, Stone and Marsh acquired the share of Alexandre Bienvenu De Vince by a public sale provoked by his widow and heirs, in 1825. He complains, that Boyd Smith has entered upon a large part of the tract to his great damage: he prays that he may be quieted in his title, and that the defendant may be forever prohibited from setting up any right to the said land, and for \$1000 damages.

The defendant in his answer, denies the allegations in the petition. He avers that he is the owner of the tract of land in the *Island de la Petite Anse*, having a front of fourteen *arpens* on the left bank of the bayou Petite Anse, bounded southerly by land formerly owned by Eliza Hayse, and northerly by the upper line of said tract. That he purchased by the advice and with the assistance of the plaintiff himself, being an entire stranger in the country, and that the plaintiff, when he advised him to make the purchase, was owner of the same titles under which he now pretends to claim the land, but concealed their existence from the defendant. That in consequence of such fraudulent conduct, the plaintiff is precluded from setting up any title or claim to said land, or, if said title prevails, is bound to pay all the damage which the defendant will have sustained by reason of said frauds, which, in the event of the plaintiff's succeeding, will amount to \$10,000, which he claims of the plaintiff. The defendant further pleads prescription. He then details the chain of titles from Fontennette, and calls the heirs of Joshua Baker, his immediate vendors in warranty. The warrantors thus cited, join with the original defendant, and set up the same defence.

The plaintiff has appealed from a judgment against him.

In support of his title, the plaintiff gave in evidence the certificate of the Land Commissioners, B. No. 61, recommending for

confirmation the claim of Jacques Fontennette and Alexandre Bienvenu, for all the vacant land on the island of Petite Anse, from which it appears, that the notice of the claim was accompanied by the petition of the claimants for said land, dated October 8, 1796; and that, on the 24th of August, 1797, the Commandant ordered the Surveyor of the Port to lay out the lands of the proprietors of said island, and ascertain what might remain vacant. It appears from said certificate, that a survey was made in 1810, at the request of the Board of Commissioners, by Thomas Orme, a Deputy Surveyor. It further appears, that the claim thus recommended, was confirmed by act of Congress in 1816. The plaintiff also gave in evidence a copy of Orme's plat of survey, which shows on the north $85\frac{1}{2}$ acres, on the east 217 acres, and on the south 165 acres, in all $467\frac{1}{2}$, as embraced in the inchoate grant to Fontennette and De Vince, and confirmed by the act of Congress.

The plaintiff next gave in evidence a sale, dated April 3, 1810, by Fontennette, one of the grantees, to John and David Hayse, of a tract of land, described as "*une terre située aux côtes à coïrin au bout des concessions de quarante arpens sur le bayou de La Petite Anse, contenant toute la terre qui se trouve incluse dans les titres de concession qui ont été accordés par le gouvernement Espagnol au dit sieur vendeur dans le dit lieu.*" J. and D. Hayse, on the 7th March, 1814, sell the same land, by a similar description in English, to Jesse McCall, who, in 1818, conveyed to Stone and Marsh, several tracts of land on the island; having previously, in 1814, sold one tract of fourteen *arpens* front, to Joshua Baker. It is, therefore, important to analyze minutely these two conveyances.

The sale from McCall to Stone and Marsh embraces three tracts upon the Island: First, Twenty *arpens* front by the ordinary depth, bounded on the north by Elizabeth Hayse, on the east by lands claimed by Madame Bienvenu and J. Fontennette, on the south by the sea marsh, and a tract of $194\frac{1}{2}$ *arpens*, laid off on the plat of said island, to J. Fontennette, and at present claimed by McCall, and on the west by the sea marsh. The second tract comprises the $194\frac{1}{2}$ *arpens*, specified as forming a part of the boundary on the south side of the first tract, ex-

cepting from the same 150 *arpens*, reserved by the said McCall to be taken from the west end. The third tract, comprehending the extent of said McCall's claim in the parcel of land specified as *forming the eastern boundary of the first tract*, not interfering with the 150 *arpens* reserved. The second tract intending to comprise all that tract heretofore purchased by the said McCall, of David and John Hayse, and *which lies on the east side of the first tract*, and adjoining the second tract, referring for a more particular description to the plat of said island, made by Thomas Orme in 1810. The 150 *arpens* reserved by McCall were afterwards purchased by Stone and Marsh.

This conveyance does not appear to us to embrace the fraction on the north end of the island, of 85½ acres now in controversy. According to Orme's survey, that tract was entirely separated from the two others, which together were confirmed to Fontennette and DeVince by the act of Congress, on the recommendation of the commissioners. It is true, the vendor says, that he sells all that tract purchased by him of David and John Hayse; but he adds, *and which lies on the east side of the first tract*, thereby qualifying the expression so as not to embrace all purchased by him *on the north end of the island*, which embraces the *locus in quo*. We are confirmed in this construction of the deed by the fact, that McCall had already, in 1814, sold to J. Baker, under whom the defendant holds, the same land extending *fourteen arpens* in front, *from the land of Elizabeth Hayse to the sea marsh*, which description embraces equally the *locus in quo*. This sale purports to be of *fourteen arpens*, which Fontennette had sold to McCall by a separate deed, and is apparently grounded upon a distinct grant to Fontennette. No such grant is shown in the record; and it is evident, that the ten *arpens* front, bounded by Elizabeth Hayse, and confirmed to Lightner, cover the same land except the land now in controversy. But although Fontennette had no such title to the *fourteen arpens*, the same having been probably annulled by the Baron Carondelet in 1796, as appears by his official decree in the record; yet if he had any right or title to any part of the tract thus sold, there is no doubt it passed to McCall, his vendee. Now we have seen, that jointly with De Vince he had a grant in the small fractional tract, on the

north of the island, extending from Lightner's tract of *ten arpens* to the sea marsh, and it is precisely that land which he sold to Baker. The latter, therefore, acquired from McCall by that sale, all the title of his vendor, to wit, one undivided half as joint owner with De Vince.

It results from this view of the case, which we have adopted after minute and patient examination, that the question of title between the parties depends on the fact, whether Fontennette, the vendor of McCall, had a separate and distinct title to the tract purchased afterwards by Joshua Baker. We have said, that the original grant to Fontennette was probably annulled by Carondelet. It is not necessary to decide positively that such was the case; for no title is exhibited to Fontennette except the one jointly with De Vince, which is the only title out of the domain which has been recognized by the land department, and indeed no other evidence of a primitive title is shown. We are, therefore, authorized to say, that none ever existed in that part of the island, except that of Lovelace, which Carondelet declares to remain in force, and which was confirmed by the Commissioners, and covers all the pretended grant of Fontennette, except four *arpens* front; and those four *arpens* are the land now in controversy.

It would seem, therefore, according to the written titles, that one-half of the tract belonged to the plaintiff previously to the purchase by the defendant of the heirs of Baker, and he would be entitled to recover, were it not for the peculiar circumstances under which the defendant made his purchase. But it is contended, that Marsh is estopped from setting up any title adverse to that acquired by Smith, because he advised Smith to make the purchase, while he was owner of the same title under which he now sues, the existence of which he concealed from Smith. The evidence in support of this allegation is, that before Smith came to the country, Marsh had been requested to purchase a tract for him. That his brother arrived in 1829, and introduced himself to Marsh, and inquired of him whether he had made a purchase for his brother, the defendant. He answered, that he had not bought, but had a tract in view, and requested defendant's brother to go and look at it. The latter replied, that he was no judge of land, and it would be

Marsh v. Smith.

of no use. Marsh stated, that the land was good sugar land, and that he hoped the defendant would buy it, as it was near his plantation: The defendant afterwards came on and made the purchase. Another witness, who is unimpeached, testifies, that Smith came to the State in 1829, and was as he understood from the plaintiff, his particular friend. That he afterwards purchased the tract of land in question of the heirs of Joshua Baker, and was particularly advised to do so by the plaintiff. This was stated by the plaintiff to the witness both before, and after the purchase. It cannot be supposed, that the plaintiff was ignorant of his own title, and if this case presented only a conflict of boundaries, it might be supposed that the plaintiff was under a mistake as to the boundary of his own land. But such is not the case. The small tract of land in dispute, lies in the corner of the small island, and is the only spot in dispute—all the rest of the island being covered by undisputed titles. It is, however, contended by the counsel of the plaintiff, that his client only recommended to Smith to purchase Baker's tract of ten *arpens* front, by forty deep, and not a front of fourteen *arpens*. But we think the advice of Marsh must be taken, according to the evidence, to refer to the title of Baker such as it appeared on the public records, and that is, a sale from Jesse McCall in 1814, of fourteen *arpens* front, bounded on the south by land of Elizabeth Hayse, and north by the sea marsh. The record does not show that Baker had a tract of ten *arpens*, independently of that purchased of McCall.

The principle invoked by the defendant's counsel is one well settled, that if a man stands by and is silent while his own property is sold, and suffers another to become the purchaser, he is estopped from disputing a title thus acquired. The rule of law is well expressed by Lord Denman in the case of *Pickard v. Sears*, (6 Adol. & Ellis, 469,) to wit, that where one by his words or conduct, wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time."

There are cases, says Judge Story, in his Treatise on Equity, in which a man may innocently be silent; "but in other cases

Marsh v. Smith, &c.

a man is bound to speak out ; and his very silence becomes as expressive as if he had openly consented to what was said or done and had become a party to the transaction. Thus, if a man, having a title to an estate, which is offered for sale and knowing his title, stands by and encourages the sale, or does not forbid it, and thereby another person is induced to purchase the estate under the supposition that the title is good, the former so standing by, and being silent will be bound by the sale ; and neither he, nor his privies will be at liberty to dispute the validity of the purchase." 1 Story on Equity, 375, § 385. 3 Robinson, 332. 1 John. Ch. Rep. 354.

We cannot but conclude that the present case comes within the principle thus laid down, and especially the great principle of equity, that where one of two innocent persons must suffer, he shall suffer, who by his own acts occasioned the confidence and the loss ; even supposing that Marsh was not fully apprised of his own title at the time he advised the purchase by Smith, it was a gross negligence on his part, which evidently misled the defendant.

Judgment affirmed.

In the cases of *James D. Denegre v. J. F. McCarthy*, from the Parish Court of New Orleans ; and of *Edward C. Mielke v. Theophilus Freeman*, and *The Merchants Insurance Company of New Orleans v. Theophilus Freeman*, from the Commercial Court of New Orleans, the judgments of the lower courts were affirmed on appeal in New Orleans, with damages, during the period embraced by this volume.

INDEX.

ACT, AUTHENTIC.

1. One, not a party to a notarial act, may prove its falsehood by competent evidence. *Mathews v. Boland*, 200.
2. An authentic act passed between the parties to a marriage, will not be conclusive against third persons, as to the property possessed by either at the time of such marriage. *Norès v. Carraby*, 292.

See NOTARY, 1.

ACTION.

See PLEADING.

ACT, SOUS SEIGN PRIVÉ.

An act, not authentic for want of form, will be obligatory as one *sous seign privé*. C. C. 2232. *Dugat v. Comeau*, 475.

ADMINISTRATOR.

See SUCCESSIONS.

ADMISSIONS.

See EVIDENCE, XIV. PLEADING, VII.

ADVOCATE.

See ATTORNEY AT LAW.

AGENCY.

1. One who pays a draft which has been fraudulently raised to a larger

- amount, must bear the loss of the difference between the amount so paid, and that for which the draft was given. *Dunbar v. Armor*, 1.
2. Where a slave, concealed on board a vessel, is carried away and lost to the owner, the master and owners of the vessel will be responsible for his value, though he was received on board by a person employed on the vessel, contrary to the orders, and without the knowledge of the master and owners thereof. The latter are answerable for the damage occasioned by the acts of those they employ, and cannot excuse themselves on the plea, that they were done contrary to their orders, and without their knowledge. C. C. 2299. *Winston v. Foster*, 113.
 3. The owners of a steamer employed in carrying freight and passengers for hire, are responsible as partners and common carriers, *in solido*, for any loss of property confided to them, occasioned by want of care or skill in those in charge of the boat. *Kelly v. Benedict*, 138.
 4. Action to recover the amount of certain notes delivered to defendant for collection, with directions to apply the proceeds in a particular way, and not accounted for. Defendant having answered, that he is not indebted to plaintiff, and had been always ready to account, an interlocutory judgment was rendered, ordering him to file an account within a fixed period. No account being filed within the time, a rule to show cause why he should not be ordered to pay the amount claimed, was made absolute, and judgment rendered for the amount. On appeal; *held*, that the judgment should be affirmed. *Nichols v. Nichols*, 175.
 5. The consignees of a vessel, who receive goods belonging to a third person residing in another place, and re-ship them by a steamer to him, will not be responsible for any loss resulting from a fortuitous event, as the snagging of the steamer, where compensation is claimed only on the ground, that the goods should have been re-shipped sooner, and not for the omission to insure. *Deaver v. Bedford*, 245.
 5. The consignees of a vessel are entitled to take charge of goods shipped by her, on which they have a lien for freight, drayage, and the expenses of storing. The best means of notifying the owner, is by advertising them. *Id.*
 7. Where a factor or merchant accepts a bill on the faith of produce consigned to him, it must be considered as an advance on it, and he has, for the amount thereof, the same privilege as though the advance had been made in money; and other creditors, who have no privilege, cannot take the property from him, without paying his advances. *Lambeth v. Turnbull*, 264.
 8. A creditor of a consignor, who has attached property of his debtor, in the hands of a consignee, who claims a privilege for acceptances made by him on the faith of the consignment, must show, in order to take the property out of the hands of the latter without paying the amount of his acceptances, that the acceptances were not made in good faith, and that the consignee is not bound to pay them. *Id.*
 9. The interest of the party by whom property is held as security, is an in-

urable one. Hence the right of agents, consignees and factors, to insure the goods of their principals.

Bell v. Western Marine and Fire Insurance Company, 423.

10. The acknowledgment of a debt by an agent, will stop prescription. *C. C.* 3486. *Greig v. Muggah*, 473.

11. One acting as an agent, may sue in his own name for the recovery of the amount of a draft drawn by himself, and accepted by the debtor of his principals. *Johnson v. Brashear*, 477.

AGREEMENTS BETWEEN PARTIES OR COUNSEL.

All agreements between parties or counsel, derogating from the rules of practice fixed by law, must be entered on the minutes of the court, or reduced to writing and filed in the record, or they will not be noticed.

Coffin v. Pollard, 124.

ALEATORY CONTRACTS.

A stake-holder who pays over the amount bet on a horse-race, without the sanction of a majority of the judges of the race, will be responsible to the winner. *Dauterive v. Broussard*, 516.

ANSWER.

See PLEADING, 19, 20, 21.

APPEAL.

1. The signature of the appellant is not necessary to an appeal bond; it is enough that it be signed by a sufficient surety. *Jones v. Sidle*, 59.

2. The 4th section of the act establishing the Commercial Court of New Orleans, so far as it attempts to authorize the Supreme Court to decide on cases in the first instance, and to determine matters not decided on in the inferior court, is unconstitutional. The Supreme Court cannot decide on the merits of a case which has not been acted on by the lower court.

Gove v. Breedlove, 78.

3. No appeal will lie from a claim for three hundred dollars, with interest, where the interest, being *ex mora*, began to run only from judicial demand. *Const.*, art. 4, sect. 2. *C. P.* 91. *Pujol v. Correjolles*, 90.

4. Defendants had each obtained, separately, judgment for \$100, with interest and costs, against the Bank of the United States, and had levied separate executions on different lots of ground. Plaintiffs having taken a rule on them, to show cause why they should not be restrained from all further proceedings for the reasons stated, the rule was made absolute, and defendants appealed. Held, that no appeal will lie, each judgment being for less than three hundred dollars. *United States v. Cochrane*, 120.

5. Where a cause has been tried by a jury, and no motion was made for a new trial, it must be an extreme case to induce the remanding of it.

Denton v. Murdoch, 127.

6. Where the record does not contain all the evidence adduced on the trial, and there is no statement of facts, bill of exceptions, nor assignment of errors, and the clerk of the lower court certifies that part of the documentary evidence, not included in the record, was not to be found among the papers, and there is no evidence to show that it has been since discovered, the appeal must be dismissed, as a *certiorari* would be useless.

Thayer v. Littlefield, 152.

7. A record certified by the clerk of the court from which an appeal has been taken, as "containing a transcript of all the proceedings, as well as of all the documents filed in the case," is insufficient, though nothing else appear to raise a doubt as to its completeness, where there is no statement of facts, bill of exceptions, or assignment of errors apparent on the record. Appellants must bring up a complete transcript of the record, with all the evidence upon which the case was tried, or show good cause why they have not done so. *Powell v. Williams*, 169.

8. Where an appellant relies upon errors apparent on the face of the record, they must be pointed out, in conformity to art. 897 of the Code of Practice.

Ib.

9. Plaintiffs having instituted suit on a note, a creditor of theirs had a *fi. fa.* levied on it, when it was agreed by the parties, that the note should be delivered to him. The note, while yet in the hands of the clerk, was attached by certain persons who had commenced an action against the seizing creditor. On a rule taken by the latter, the court ordered the note to be delivered to him, and from this judgment the attaching parties appealed. Pending the appeal, the action commenced by them against the seizing creditor, was decided against them: *Held*, that being thus without interest, the appeal must be dismissed. *Palmer v. Day*, 182.

10. One who appeals must bring before the Supreme Court all the parties, contradictorily with whom the judgment complained of was rendered, and who are interested in its remaining undisturbed.

Duggan v. De Lizardi, 224.

11. In actions on joint obligations, all the original parties must be sued together even those who may have performed their part; no judgment can be pronounced, unless it be shown that all joined in the obligation; any judgment must be against each defendant separately for his portion, but, *in solido*, for the costs. (C. C. 2080 *et seq.*;) and all the parties below must be made parties to the appeal, though a part only have appealed, or the appeal must be dismissed. Those who have not appealed must be cited as appellees.

Ib.

12. In an action in the name of the State to recover the penalty of a bond taken for the appearance of one of the obligors, the defendants may urge, for the first time, after appeal, that nothing became due to the State by its forfeiture. *Per Curiam*. Such an objection is not based on the mere in-

capacity to sue, which must be specially denied, but, tending to show the absolute want of any legal right in the State, may be taken advantage of at any stage of a cause. It goes to show that the plaintiff has no interest in the subject matter of the suit, and that the right of action does not belong to the party who seeks to enforce it. *State v. Desforges*, 253.

13. Where an appeal has been applied for within the time prescribed by the Code of Practice, art. 593, it may be obtained even after that period, when the delay results from the necessity of applying to the Supreme Court, created by the refusal of the inferior Judge to allow the appeal.

Succession of Jacobs, 270.

14. Defendants in answer to an action on their promissory notes, alleged that they had entered into an agreement with the plaintiff, and their other creditors, by which a certain per cent on the amount of their debts was to be received as a full discharge thereof, averring a tender of that amount, and that they had been always ready to comply with the terms of the compromise, but that plaintiffs had since refused to accede thereto. Plaintiffs having moved for, and obtained a judgment for the per centage alleged to have been tendered, reserving their right to prosecute for the balance, and ordering the plaintiff to retain out of the per centage enough to defray the costs of the further proceedings should they result in favor of defendants, the latter, having been refused an appeal, moved for a mandamus to compel the allowance of one. *Held*, that defendants having admitted the debt to the amount for which judgment was rendered, and having averred a tender and their readiness to pay, cannot, under art. 567 of the Code of Practice, be allowed to appeal therefrom. *Skinner v. Dameron*, 447.

15. Where a bill of exceptions is not mentioned in the argument, nor otherwise insisted on before the Supreme Court, it will be considered as waived.

Murdock v. Gurley—Application for Re-hearing, 467.

16. A plea of release not made in the lower court, will not be listened to by the Supreme Court. This defence will be presumed to have been waived.

New Orleans Gas Light and Banking Company v. Hudson, 486.

ARBITRATION.

Where it is admitted, that an award was made without the arbitrators having been sworn, parol evidence of their proceedings is inadmissible.

Sharkey v. Wood, 326.

ASSIGNEE.

See BANKRUPTCY.

ASSIGNMENT.

An assignment of a claim, though gratuitous, followed by notice to the debtor, who had no offset at the time, is valid as to him. *Harrison v. Wilson*, 275.

ATTACHMENT.

1. Where in an action commenced by attachment against an absentee, the Sheriff's return on the attachment merely shows, that he attached all the property belonging to the defendant in the hands of the garnishee, and no interrogatories are propounded to, nor other proceedings had against the latter, but the suit is carried on contradictorily, with an attorney appointed by the court to represent the defendant, he will not be considered as in court and the suit will be dismissed. *Hoey v. Pepper*, 119.
2. Where property has been shipped to consignees entitled to a privilege thereon, so that the consignor or owner cannot take it out of their hands without paying their claims, a creditor of the owner cannot attach.
Lambeth v. Turnbull, 268.
3. It is not necessary to support an attachment, that the bills of exchange on which the garnishees are liable, should be within this state, nor that the evidence of the debt should be seized. There is, in this respect, a wide difference between an attachment, and a seizure under execution. Any debt due by a resident to a non-resident, whether by note, acceptance of a bill, endorsement, or otherwise, will support an attachment. Payment by a garnishee under a judgment against him will protect him from any demand by his non-resident creditor. *Bean v. Mississippi Union Bank*, 333.
4. An attaching creditor can recover of the garnishee no more than his debtor, the creditor of the garnishee, could have recovered at the date of the attachment. *Ib.*
5. An exception by the garnishees, in a suit against a corporation existing in another State, filed after issue joined, that the plaintiffs did not make certain assignees or trustees of the corporation, under a deed of assignment, parties to the action, will be disregarded, where it does not appear that the plaintiffs were parties to the deed, nor that they, or the garnishees had notice of the assignment of the debt attached, previous to the institution of the suit, and neither the corporation, nor its assignees ask to be heard. *Ib.*
6. Where an attachment has been issued against a debt due by garnishees to a corporation existing in another State, the former cannot be discharged by paying or transacting with their creditors, after notice of the attachment. A garnishee is a kind of stake-holder. He cannot enter into the contest between the plaintiff and defendant, nor change his position towards either, after notice of the attachment. He is to render a true account, and can contest only as to the amount alleged to be due by him, contradictorily with both parties, and must pay to the party entitled thereto, the balance found to be due. Nor can he be released by a payment made by the drawers of the note on which he was indebted as endorser, if made after notice of the attachment. *Ib.*
7. Where, in an action against a Bank on its notes, plaintiffs attached a debt due to the Bank by persons who were made garnishees, the latter will be entitled to discharge their debt in notes of the Bank, only where they prove that they were in possession of them previous to the attachment. *C. C.* 2312. *Ib.*

8. It is not to be expected that a plaintiff can describe in his petition with great accuracy, the debts, or forms of the obligations between his debtor and the garnishees in an attachment suit. He has not, in many cases, the necessary information to enable him to do so. *Id.*
9. The holder of a promissory note cannot proceed by attachment against an endorser, previous to maturity. The obligation of the endorser may never become absolute; the drawer may pay, or, in the event of his failure, the endorser be discharged by the omission of demand, protest, or notice.

Harrod v. Burgess, 449.

ATTORNEY AT LAW.

1. Extra compensation, promised to an attorney employed by the year, at a fixed salary, for the prosecution of certain suits, cannot be recovered before the decision of the suits, where the amount was not promised to be paid in advance. *State v. Atchafalaya Rail Road and Banking Co.*, 66.
2. Where it appears from the return of the Commissioner, that a witness whose deposition was taken by him, was cross-examined by a member of the bar, not the counsel of record of the party, it will be presumed that he had authority to appear, either from the client, or his counsel of record, unless his authority be denied on oath. *Kelly v. Benedict*, 138.
3. Where, after the resignation of his appointment, an attorney who had been employed at an annual salary, continues, with the approbation of his former clients, his attention to the suits which originated during his term of office, and his services are shown to have been useful to them, he may recover compensation therefor.

Carter v. Second Municipality of New Orleans, 238.

ATTORNEY IN FACT.

See AGENCY.

RAIL.

By the passage of the act of 28th March, 1840, chap. 117, abolishing imprisonment for debt, bail not previously fixed with the debt, were discharged.

Jartroux v. Debergue, 196.

BANK.

The president and directors of a Bank have no authority, without the consent of the stockholders, to confess a forfeiture of the charter. But where, in their answer to an application on the part of the State for such forfeiture, they do not deny the grounds of forfeiture set forth in the petition, they must be taken to be true, and a forfeiture decreed accordingly.

State v. Atchafalaya Rail Road and Banking Co., 63.

BANKRUPTCY.

1. The act of Congress of 19th August, 1841, establishing a uniform system of bankruptcy suspended, if it did not abolish, all the laws of the different States relative to insolvent debtors, taking away the jurisdiction of their tribunals, and establishing others in their place, with ample and exclusive powers over every question touching the property surrendered by a bankrupt, its sale, and the disposition of the proceeds. The State courts have, consequently, no jurisdiction, and cannot interfere between a creditor put on the list of a bankrupt and his assignee, in any matter relating to the final liquidation of the estate surrendered. The decree of bankruptcy operates as a stay of all proceedings. *Clarke v. Rosenda*, 27.
2. The act of 19th August, 1841, contemplates, that all property surrendered by a bankrupt, whether incumbered, or not, shall be administered by the court before which the proceedings in bankruptcy are pending. A mortgagee, or other privileged creditor, does not impair his rights, by proving his debt before the bankrupt court. He cannot abstain from claiming under the bankruptcy, and proceed contradictorily with the assignee, to have the mortgaged premises sold to satisfy his debt. He must make himself a party to the proceedings in bankruptcy, and come in for his dividend under the act of Congress. *Ib.*
3. Under the bankrupt act of 19th August, 1841, the District Courts of the United States, sitting in bankruptcy, are vested with all the powers necessary to effect a final settlement and liquidation of the affairs of the bankrupt. Sections 6, 8. *Conrad v. Prieur*, 49.
4. The interest of persons holding mortgages or privileges under the laws of Louisiana on property surrendered by a bankrupt, is an adverse interest touching such property, and under sections 6 and 8 of the bankrupt law of 1841, the District Courts of the United States are vested with power to cite such persons, and to order the erasure of the mortgages and privileges, when necessary for the settlement of the bankrupt estate, and to do justice to the creditors; and it will be the duty of the Recorder of Mortgages under the State laws, to obey such order. *Ib.*
5. There are essential differences between the bankrupt law of England and of this country. The former is exclusively a forced proceeding; the bankrupt is not required, as here, to make a surrender of all his property for the benefit of all his creditors; a creditor may take no part in the bankrupt proceedings, but retain his remedy in the courts of law. Here, by the law itself, every creditor is made a party to the bankruptcy, all are cited, and an issue is joined between them and the bankrupt, who, in consideration of his surrender, sues for a discharge. *Ib.*
6. From the nature of the mortgages and privileges allowed by the laws of this State, no settlement of a bankrupt's estate on which such incumbrances exist, could ever be made without reducing the whole estate to cash; and this can only be done after the property has been released from the incumbrances. Such an estate can only be settled in a *concurso*, contradictorily between all the creditors. *Ib.*

7. By the laws of this State, both the possession and title of property subject to mortgage, whether conventional, legal, or judicial, remain in the debtor, and the mortgagees are to be paid, according to the dates of the registry of such mortgages in the office of the Recorder of Mortgages, or of the acts giving rise to any legal mortgage, and the mortgage is but an accessory to a principal obligation, and is extinguished with it. C. C. 3374. Most of the privileges recognized by our laws are allowed in view of insolvency, and can be exercised only on the proceeds of the property surrendered by the debtor. By the laws of England, and of the other States of the Union, though regarded in equity as a mere security for the debt and only a chattel interest, a mortgage transfers the property itself, and vests the legal title in the mortgagee. Hence, while in England, and the other States, the equity or right of redemption alone passes to the assignee, here, all the property, whether subject to mortgages and privileges or not, becomes a part of the bankrupt's estate, subject to the disposition of the bankrupt court. *Ib.*
8. A mandamus will be granted by a State court to compel obedience to an order of a District Court of the United States sitting in bankruptcy, directing a Recorder of Mortgages to erase certain mortgages. *Ib.*
9. The assignee of a bankrupt, under the act of 19th August, 1841, who claims the interest of the latter in a suit, may file a third opposition, for the purpose of asserting the rights of the creditors whom he represents. C. P. 396.
Vidal v. Ocean Insurance Company, 68.
10. No action whatever, executory or ordinary, can be maintained against a bankrupt, regularly discharged under the act of Congress of 19th August, 1841, for a debt contracted previous to his bankruptcy, where the plaintiff was placed on the list of creditors filed in compliance with the act. The action must be against the assignee.
City Bank of New Orleans v. Walton, 158.
11. The State tribunals were not deprived, by the bankrupt law of 19th August, 1841, of any portion of their jurisdiction, necessary to the final administration of the estates of insolvents who had made a surrender of their property previous to its passage. A State court, in which a surrender was made, has authority to decide, between the syndic of the creditors under the cession in the State court, and an assignee subsequently appointed by the United States Court under the bankrupt act, the right to property alleged to have been ceded under the State law, but afterwards placed on the schedule of the debtor, on his application to be declared a bankrupt.
West v. His Creditors, 261.
12. A judgment rendered in a State court against a party declared a bankrupt under the act of Congress of 1841, and to whom an assignee had been appointed, without such assignee having been made a party, is a nullity.
Harrod v. Burgess, 440.
13. The assignee of a bankrupt under the act of Congress, of 19th August, 1841, may come into the State courts, for the purpose of protecting the interests confided to him. *Ib.*

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. The holder of a bill of exchange, is under no obligation to use active diligence in suing an acceptor, or any other party. He may remain passive, and forbear to sue as long as he pleases; but he must not agree to give time to an acceptor, so as to preclude himself from suing, and thus suspend his remedy against the latter, to the prejudice of the drawer and endorsers. To make an agreement for indulgence obligatory, it must be for an adequate consideration. A delay, without sufficient consideration, and without taking any new security, being *nudum pactum*, will not discharge the other parties. Nor will they be discharged where the agreement, though obligatory, was made with their consent. *Frazier v. Dick*, 249.
2. Where, after the last day of grace, the drawer of a bill promises the holder to pay it, if he will not present it, and the latter subsequently presents and protests it, the former will be released from any obligation arising from his conditional promise. *Keith v. Mackey*, 277.
3. After the last day of grace, the funds in the hands of the drawee are at the risk of the holder. *Id.*
4. Though the drawer of a bill may be discharged from his obligation to pay it, by the neglect of the holder to have it presented at the place of payment, and protested, and to have notice given thereof, on the ground of the damage he is presumed to have sustained by the *laches* of the latter, yet, if he afterwards withdraws from the hands of the drawee the funds on which he had drawn, he will be responsible, under art. 2294 of the Civil Code, to the holder, who had become the owner thereof, for the amount. *Id.*
5. It is not necessary to support an attachment, that the bills of exchange on which the garnishees are liable, should be within this State, nor that the evidence of the debt should be seized. There is, in this respect, a wide difference between an attachment, and a seizure under execution. Any debt due by a resident to a non-resident, whether by note, acceptance of a bill, endorsement, or otherwise, will support an attachment. Payment by a garnishee under a judgment against him, will protect him from any demand by his non-resident creditor. *Bean v. Mississippi Union Bank*, 333.
6. A garnishee cannot be released by a payment made by the drawers of the note on which he was indebted as endorser, if made after notice of the attachment. *Id.*
7. Legal subrogation results from the payment of a bill of exchange, or promissory note, by an endorser, though made before maturity. The endorser is included in the third paragraph of art. 2157 of the Civil Code, he being bound with, or for the maker or acceptor, and the article referring to all obligations whatever, whether absolute or conditional. *Wiggin v. Flower*, 406.
8. Though the obligation of an endorser or surety cannot be enforced till after the event on which it becomes absolute, it exists from the time when it was contracted, for it is susceptible of being compromised, released or transferred, and of passing to heirs, &c. So the rights of the endorser, or surety,

- against the maker or principal, exist before the obligation of the former becomes absolute. *Ib.*
9. Endorsers and sureties are, under the Civil Code, conditional obligors of the creditor of the maker and principal, and at the same time, conditional creditors of the latter. Though no conservatory acts can be exercised against the conditional debtor by endorsement, until his obligation becomes absolute, both the endorser and the surety, may, under art. 2037 of the Civil Code perform all acts conservatory of their respective rights, even before their own obligations have become absolute. *Ib.*
10. The rights of a surety subrogated to those of a creditor, whether payment was made before the obligation of the surety became absolute, or after, result from his original contract with his principal, and are restrained by it. Those of an endorser, not for accommodation, in the same situation, are under no restraint from his original contract with the maker, or acceptor, to wit, that the whole amount of the bill should be paid to him, or his order. *Aliter*, as to an accommodation endorser, who, being viewed as a surety, will be restricted to the sum actually paid by him. *Ib.*
11. Plaintiffs accepted a bill payable at a future period, which was endorsed by the payee to third persons, by whom it was endorsed to a bank, which discounted the bill in their favor. The latter having paid the bill, before maturity, in notes of the bank, which were under par, claimed the whole amount of the bill from the acceptors. *Held*, that the plaintiffs did not, by the endorsement and discount of the bill, and the subsequent depreciation of the notes of the bank, acquire *ipsis factis*, any more than an inchoate and incomplete right to pay in such depreciated notes, not being parties to any act or contract from which such a right might result; that not having manifested any intention to avail themselves of the advantage which the depreciation of the bank notes offered, until, by the payment of the bill, the endorsers had acquired the rights of the bank thereto, plaintiffs were in the same situation in which they would have been, had the bank transferred the note at any time after its discount; and that, by their acceptance, plaintiffs bound themselves to pay to the order of the payee, the whole amount of the bill, that the endorsers became entitled thereto by the transfer of the bill, that the bank acquired their rights by the discount, and that, the endorsers, by the payment of the bill, acquired a legal subrogation to the rights of the bank. *Ib.*
12. Ordinary endorsers are not placed on the same footing as sureties; nor can they, like the latter, claim the benefit of discussion. *Ib.*
13. Proof of written notice to the endorser of a note of its non-payment by the makers, and of protest, is necessary to a recovery against him. *McKee v. Dubois*, 421.
14. The holder of a promissory note cannot proceed by attachment against an endorser, previous to maturity. The obligation of the endorser may never become absolute; the drawer may pay, or, in the event of his failure, the endorser be discharged by the omission of demand, protest, or notice. *Harrod v. Burgess*, 449.
15. Where a debtor has made a *cessio bonorum*, all his debts, whether payable

then or at a future period, are placed on the same footing, the latter being reduced in proportion to the distance of the day of payment. All the creditors, including those whose debts were payable at a future time, are entitled to a voice in fixing the terms of sale; nor will the consent of a creditor to the sale of the property on a credit, be considered an extension of the time of payment, so as to release others bound with the insolvent as endorsers or sureties. *Léger v. Arcenauz*, 513.

CARRIERS.

1. To recover of the owners of a steamer, as common carriers, the value of property lost or destroyed by them, it is sufficient to allege that the defendants undertook as carriers to convey the property for hire, and failed to do so. Any specification of the acts, or neglect which occasioned the loss may be regarded as surplusage, and can furnish no ground for excepting to the petition as uniting distinct causes of action—a cause *ex contractu*, with one *ex delicto*. *Key v. Benedict*, 138.
2. The owners of a steamer employed in carrying freight and passengers for hire, are responsible as partners and common carriers, *in solido*, for any loss of property confided to them, occasioned by want of care or skill in those in charge of the boat. *Ib.*
3. The owner of a steamer, as a common carrier, is responsible for property received on his boat, and lost by his fault. *Clines v. Frisbee*, 192.
4. Interest is due, from judicial demand, on an amount recovered as damages for property lost by a common carrier. The sum claimed arises out of a contract, though the amount due was unliquidated. *Ib.*

CITATION.

1. Where in an action commenced by attachment against an absentee, the Sheriff's return on the attachment merely shows, that he attached all the property belonging to the defendant in the hands of the garnishee, and no interrogatories are propounded to, nor other proceedings had against the latter, but the suit is carried on contradictorily, with an attorney appointed by the court to represent the defendant, he will not be considered as in court, and the suit will be dismissed. *Hoey v. Pepper*, 119.
2. To give to a court, in any case, jurisdiction of the person, the party must have had due notice of the suit. *McNairy v. Bell*, 418.

CODES, ARTICLES OF, CITED, EXPOUNDED, &c.

I. *Civil Code of 1808.*

II. *Civil Code.*

III. *Code of Practice.*

I. Civil Code of 1808.

Book III, Tit. I. arts. 43, 49, 51. Irregular successions. *Layre v. Pasco*, 9.
 ——— Tit. V. arts. 63 to 85. Community of gains. *Noris v. Carraby*, 293.

II. Civil Code.

- 184 to 190. Emancipation of slaves. *Mathews v. Boland*, 200.
 477. Vacant successions. *Layre v. Pasco*, 9.
 763, 764. Servitudes. *Barton v. Kirkman*, 16.
 911, 917, 923. Irregular successions. *Layre v. Pasco*, 9.
 982. Acceptance of successions. *Greig v. Muggah*, 473.
 1163. Successions—sale of effects. *Succession of Porter*, 96.
 1370, *et seq.* Actions against successions. *Duggan v. De Lizardi*, 224.
 1375, 1376. Obligation of heirs. *Greig v. Muggah*, 473.
 1468. Donations between parties living in concubinage. *Layre v. Pasco*, 9.
 1571. Dispositions *mortis causa*. *Succession of Pough*, 503.
 1575. ———. *Succession of Key*, 482.
 1663. Sale of effects of successions. *Succession of Porter*, 96.
 1775. Contracts. *Dugat v. Comeau*, 475.
 1811. ——— *Beach v. McDonough*, 352.
 1841. ——— *Loddell v. Burke*, 93.
 1844. ——— *Mitchell v. Cooley*, 240.
 1887, 1889 ——— *Slidell v. Pritchard*, 101.
 1890. ——— *Dickerson v. Gordy*, 489. *Dugat v. Comeau*, 475.
 1906, 1907. ——— *Sewell v. Willcox*, 83.
 1928. ——— *Kernan v. Chamberlin*, 116.
 1934. Compound interest. *Mayor &c. of New Orleans v. Commercial Bank of New Orleans*, 234.
 1940. Contracts. *Knox v. Liddell*, 111.
 1979. ——— *Prats v. His Creditors*, 288.
 2037, 2038. ——— *Wiggin v. Flower*, 406.
 2073, 2075, 2079. ——— *Erwin v. Greene*, 70.
 2080. ——— *Ib.* *Duggan v. De Lizardi*, 224. *Cleary v. Second Municipality of New Orleans*, 247.
 2081. ——— *Duggan v. De Lizardi*, 224. *Cleary v. Second Municipality of New Orleans*, 247.
 2082. ——— *Erwin v. Greene*, 70. *Duggan v. De Lizardi*, 224.
 2088. ——— *Erwin v. Greene*, 70.
 2112. Obligations of heirs. *Greig v. Muggah*, 473.
 2130. Contracts. *Wiggin v. Flower*, 406.
 2145. Payment to prejudice of seizure or attachment. *Bean v. Mississippi Union Bank*, 333.
 2156. Subrogation. *Harrison v. Bisland*, 204.
 2157. ——— *Ib.* *Powell v. Kellar*, 272. *Wiggin v. Flower*, 406.
 2212. Compensation. *Bean v. Mississippi Union Bank*, 333.
 2232. Authentic acts. *Dugat v. Comeau*, 475.
 2252. Contracts. *Marigny v. Union Bank of Louisiana*, 354.

2256. Contracts evidence of. *Knox v. Liddell*, 111.
 2257. ————— *Derbes v. Décuir*, 491.
 2261, 2262. Quasi-contracts. *Slidell v. Pritchard*, 101.
 2288. ————— *Powell v. Kellar*, 272.
 2294. Offences and quasi-offences. *Gove v. Breedlove*, 70. *Kernan v. Chamberlin*, 116. *Keith v. Mackey*, 277.
 2295. ————— *Gove v. Breedlove*, 70. *Kernan v. Chamberlin*, 116.
 2296, 2297, 2298. ————— *Gove v. Breedlove*, 70.
 2299. ————— *Ib.* *Winston v. Foster*, 113. *Kelly v. Benedict*, 136.
 2300 to 2304. ————— *Gove v. Breedlove*, 711.
 2355. Wife's mortgage and privilege. *Vanhille v. Her Husband*, 496.
 2373. Community of gains. *Caldwell v. Hennen*, 20.
 2456. Sale. *Bell v. Dowly*, 18.
 2472. ————— *Sewell v. Willcox*, 83.
 2474. Prescription. *Ib.*
 2480, 2481, 2482. Sale. *Jeannin v. Millaudon*, 76.
 2508. ————— *Fox v. Walsh*, 222.
 2675, 2676. Lease. *Penn v. Collins*, 213. *Beach v. M'Donough*, 352.
 2677, 2679. ————— *Penn v. Collins*, 213.
 2816, 2818, 2819. Partnership in commendam. *Lachomette v. Thomas*, 172.
 2952, 2953. Aleatory contracts. *Slidell v. Pritchard*, 101.
 3008. Surety. *Erwin v. Greene*, 70.
 3030. ————— *Penn v. Collins*, 213.
 3038, 3040. Compromise. *Hodge v. Leeds*, 322.
 3158, 3182. Privilege. *Vanhille v. Her Husband*, 496.
 3204, § 8. ————— *Bell v. Western Marine and Fire Insurance Co.* 423.
 3213. ————— *Hairy v. Dennistoun*, 130.
 3245. Mortgages. *Conrad v. Prieur*, 49. *Vanhille v. Her Husband*, 496.
 3246, 3247, 3248. Mortgages. *Conrad v. Prieur*, 49.
 3249. ————— *Ib.* *Erwin v. Greene*, 70. *Vanhille v. Her Husband*, 496.
 3250. ————— *Conrad v. Prieur*, 49.
 3251, 3252. ————— *Ib.* *Erwin v. Greene*, 70.
 3253 to 3271. ————— *Conrad v. Prieur*, 49.
 3272. ————— *Ib.* *Dugat v. Comeau*, 475.
 3273 to 3286. *Conrad v. Prieur*, 49.
 3287. ————— *Ib.* *Vanhille v. Her Husband*, 496.
 3288 to 3322. ————— *Conrad v. Prieur*, 49.
 3323. ————— *Ib.* *Prats v. His Creditors*, 288.
 3324. ————— *Conrad v. Prieur*, 49.
 3325, 3326. ————— *Ib.* *Prats v. His Creditors*, 288.
 3327. ————— *Conrad v. Prieur*, 49.
 3328. ————— *Ib.* *Succession of Dough*, 50.
 3329 to 3374. ————— *Conrad v. Prieur*, 49.
 3391, 3393. Possession. *Barnes v. Gaines*, 314.
 3486. Prescription. *Greig v. Muggah*, 473.
 3507. ————— *Sewell v. Willcox*, 83.

- 3529 § 23. Definition of law terms. Notice. *Hallock v. Caruthers*, 190.
McKee v. Dubois, 421.

III. Code of Practice.

35. Equitable action. *Mitchell v. Cooley*, 240.
 43, 49. Petitory action. *Barnes v. Gaines*, 314.
 91. Jurisdiction. *Pujol v. Correjollas*, 90.
 113. Actions by heirs. *Greig v. Muggah*, 473.
 120. Actions against heirs. *Duggan v. De Lizardi*, 224. *Greig v. Muggah*, 473.
 285, 288. Tutorship. *Tutorship of Labarre*, 268.
 313. Judgment by default. *Guillotte v. Thompson*, 141.
 322. Tutorship. *Tutorship of Labarre*, 268.
 349. Interrogatories to a party. *Dickerson v. Gordy*, 489.
 351. ——— *Derbes v. Dêcûir*, 421.
 377. Reconvention. *Bayne v. Fox*, 2.
 385. Warranty. *Jeannin v. Millaudon*, 76.
 396. Opposition of third persons. *Vidal v. Ocean Insurance Company*, 68.
Beach v. M'Donough, 352. *Vanhille v. Her Husband*, 496.
 397, 398. ——— *Beach v. M'Donough*, 352.
 399. ——— *Vidal v. Ocean Insurance Company*, 68.
 401, 403. ——— *Vanhille v. Her Husband*, 496.
 424, 425. Commission to take testimony. *Denton v. Murdock*, 127.
 426, 428. ——— *Hallock v. Caruthers*, 190.
 515, 516. Trial by Jury. *Gove v. Breedlove*, 78.
 517. ——— *Penn v. Collins*, 213.
 519, 521, 524, 528. ——— *Gove v. Breedlove*, 78.
 536. Nonsuit. *Buchanan v. Locke*, 211.
 567. Appeal. *Skinner v. Dameron*, 447.
 569. ——— *Bouquevalle v. Young*, 162.
 593. ——— *Succession of Jacobs*, 270.
 606, 616. Rescission of judgments. *Darse v. Leaumont*, 284.
 678, 679, 693, 695, 704, 706, 707. Sale under Fi. Fa. *Powell v. Kellar*, 272.
 708. ——— *Ib. Dimitry v. Pollock*, 347.
 710. ——— *Powell v. Kellar*, 272. *Vanhille v. Her Husband*, 496.
 711. ——— *Cleary v. Second Municipality of New Orleans*, 247.
 713. ——— *Powell v. Kellar*, 272. *Vanhille v. Her Husband*, 496.
 714, 715. ——— *Vanhille v. Her Husband*, 496.
 732, 733, 739. Executory process. *Clarke v. Rosenda*, 27.
 766, 767. Duties of Sheriff, and remedies against. *Dussin v. Delaroderie*, 202.
 845, 846, 853. Prohibition. *Clarke v. Rosenda*, 27.
 877. Powers of courts. *Jones v. Sidle*, 59.
 897. Appeal—errors of law. *Powell v. Williams*, 169.
 898. ——— *Certiorari. Thayer v. Littlefield*, 153.

992. Appeal, plea of prescription. *Sewell v. Willcox*, 83.
 994. Courts of probate. *Bayne v. Fox*, 2.
 993. Successions. *Barnes v. Gaines*, 314.
 984. ——— *Succession of Jacobs*, 270.
 986. ——— *Succession of Porter*, 96. *Succession of Jacobs*, 270.
 987, 990, 991, 992, 995. ——— *Succession of Porter*, 96.
 1034, 1035. Proceedings in courts of Probate. *Ib.*

COMMERCIAL BANK OF NEW ORLEANS.

1. The thirty-seventh section of the Act of 1 April, 1833, incorporating the Commercial Bank of New Orleans, which exempts its capital from the payment of any tax imposed by the State, or any parish, or body politic under its authority, does not exempt from such taxation, slaves, or other real property held by the bank. Nothing is exempted but the three millions of dollars furnished by the stockholders for its operations. *Second Municipality of Orleans v. The Commercial Bank of New Orleans*, 151.
2. The interest of five per cent. per annum, allowed to the City of New Orleans by section 23 of the act of 1st April, 1833, incorporating the Commercial Bank of New Orleans, is to be calculated on the surplus of the semi-annual dividends on the stock subscribed for by the City, remaining after the payment of the interest on the bonds given to the Bank by the City, and directed to be set apart as a sinking fund. It was not intended, that interest should be calculated on such surplus every six months, and be added thereto, so as to form new capital, bearing like interest. The Legislature did not intend to allow compound interest. *Mayor &c. of New Orleans v. Commercial Bank of New Orleans*, 234.

COMPENSATION.

1. An assignment of a claim, though gratuitous, followed by notice to the debtor, who had no offset at the time, is valid as to him. *Harrison v. Wilson*, 275.
2. Where, in an action against a Bank on its notes, plaintiffs attached a debt due to the Bank by persons who were made garnishees, the latter will be entitled to discharge their debt in notes of the Bank, only where they prove that they were in possession of them previous to the attachment. *C. C. 2219. Bean v. Mississippi Union Bank*, 323.

CONFESSION OF JUDGMENT.

1. No particular form is necessary to a confession of judgment. Any admission of the debt sued for, which is such, that it leaves no issue to be tried, is, in fact, a confession of judgment. If the admission goes only to a part of the sum claimed, it is a confession *pro tanto*; and there is no reason why the creditor should be delayed in the collection thereof, until a decision be had on the disputed portion. *Skinner v. Dameron*, 447.

CONSTITUTION OF THE STATE.

1. The rules which govern in the construction of a statute, are applicable to the Constitution, when supposed to conflict with an act of ordinary legislation. *Nicholson v. Thompson*, 367.
- Art. 4, sect. 2. Supreme Court. *Pujol v. Correjolles*, 90.
- , — 5. Removal of Judges. *Nicholson v. Thompson*, 367.
- , — 10. ———clerks. *Ib.*
- , — 11. Continuance of existing laws in force. *Ib.*
- 5, sect. 3. Impeachment. *Ib.*
- 6, — 8. Duration of Officers, &c. *Ib.*
- Schedule, sect. 4. Continuance of existing laws in force. *Ib.*

CONTRACTS.

- I. *Consent necessary to Form, and confirmation.*
- II. *Joint contracts.*
- III. *Illegal contracts.*
- IV. *Proof.*
- V. *Interpretation.*
- VI. *Putting in default.*
- VII. *Damages for non-performance.*
- VIII. *Extinction.*

I. *Consent necessary to Form, and confirmation.*

1. No obligation or right can result to any one from an act or contract, to which he was not a party, until he manifests his intention to avail himself of such right. *Wiggin v. Flower*, 406.
2. Where a contract is made for another, subject to his ratification, he will be presumed to have ratified it, unless, on being informed thereof, he immediately repudiates it. *Lartigue v. Peet*, 91.
3. The voluntary execution of a contract, with the full knowledge of the grounds upon which it might be rescinded, amounts to a ratification of it, and involves a renunciation of the means and exceptions that might have been opposed to it. *Marigny v. Union Bank of Louisiana*, 354.

II. *Joint contracts.*

4. There is a difference between the obligations of co-heirs, and of joint obligors by contract. The law apportions among the heirs, all the charges of the inheritance, and each heir may, perhaps, be sued, separately, for his virile share. C. P. 120. C. C. 1370, *et seq.*; *aliter* as to co-obligors by joint contract, all of whom must be sued together. C. C. 2080 *et seq.* In the one case, it is a condition of his inheritance that each heir shall pay his share of the debt; but, in the other, no one of the obligors can release himself at will. *Duggan v. De Lizardi*, 224.

5. In actions on joint obligations, all the original parties must be sued together, even those who may have performed their part; no judgment can be pronounced, unless it be shown that all joined in the obligation; any judgment must be against each defendant separately for his portion, but, *in solido*, for the costs, (C. C. 2080 *et seq.*) and all the parties below must be made parties to the appeal, though a part only have appealed, or the appeal must be dismissed. Those who have not appealed must be cited as appellees. *Id.*

III. *Illegal contracts.*

6. An obligation with an unlawful cause, can have no effect. The cause is unlawful when forbidden by law, *contra bonos mores*, or contrary to public order. C. C. 1887, 1889. *Slidell v. Pritchard*, 101.
7. Any contract or agreement between an insolvent and one of his creditors, the effect of which is to secure to the latter an undue preference over the other creditors, or to procure for him a renewed claim upon the future property of the debtor, in consequence of which agreement, the preferred creditor's opposition is withdrawn, is illegal and fraudulent, and cannot be enforced. It matters not as to the nature of the opposition, if its withdrawal be the consideration or cause for which the preference is given. Thus, an agreement in consideration of the withdrawal of an opposition to the sufficiency of the security offered by an insolvent, who had been appointed syndic of his own creditors, though the opposition was made after the insolvent had obtained his discharge, of the benefit of which he could not be deprived by any subsequent opposition, is illegal and void. It is sufficient that an undue advantage is derived from it by one of the creditors. The object of the law is, that the rights of all the creditors should remain in the state they were in, at the time of the insolvency; that no change should take place so as to favor any; and that the effects surrendered, and the property subsequently acquired, should be equally divided between the insolvent's former and subsequent creditors, according to the nature, rank, and origin of their respective claims at the time of the surrender, or of the contracting of the subsequent debts. *Id.*
8. Money paid to a creditor, in pursuance of an illegal agreement with an insolvent, who has been appointed the syndic of his own creditors, to secure the payment of the creditor's claim, in consideration of his withdrawing an opposition to the sufficiency of the security offered by the syndic, cannot be recovered back, either by the debtor, or by an assignee of his property, under a bankrupt law, suing for the benefit of the creditors, or by a security, who may have paid the amount so reclaimed. Though the cause of the agreement was unlawful, it originated in a natural obligation, on which no action could be founded, but which sufficed to prevent the recovery of the money back, when once paid. C. C. 2281, 2282. *Id.*
9. No action will lie on a contract the consideration of which is prohibited by law, or which originated in the violation of any statute. C. C. 1887, 1889.

Dickerson v. Gordy, 490.

IV. *Proof.*

10. Solidarity must be stipulated expressly. It cannot be presumed. C. C. 2088. So of surety-ship. *Ib.* 3008. *Erwin v. Greene*, 70.
11. The provision of art. 2256 of the Civil Code, that "parol evidence shall not be admitted against or beyond what is contained in the acts, nor on what may have been said before, or at the time of making them, or since," is not confined to acts relative to the transfer of immoveable property or slaves, nor to authentic acts. *Knox v. Liddell*, 111.
12. The owner of a building will be responsible for extra work done on it, though it be not proved that he ordered it, where it is shown, that he was at the building daily and must have seen it, and did not forbid it. If he did not want the work done, he should have prevented its execution.
Percy v. Peyroux, 179.
13. Parol evidence is inadmissible to prove the cancelling of written contracts. Such evidence is inadmissible against a written contract; and proof that it was cancelled, is the strongest evidence that can be given against it. *Sharkey v. Wood*, 326.
14. A clear case of error, or want of consideration must be shown, to release one from an obligation who has, under his signature, acknowledged his indebtedness, and admitted a consideration. *Dugat v. Comeau*, 475.
15. The testimony of a single witness, unsupported by corroborating circumstances, is insufficient to prove a contract, not reduced to writing to pay a sum of money where the amount exceeds five hundred dollars. C. C. 2257.
Derbez v. Décuir, 491.

V. *Interpretation.*

16. Doubts as to the construction of a contract cannot avail one, who, not being a party thereto, can base his right to sue in his own name, only on a clear and unequivocal stipulation in his behalf. *Mitchell v. Cooley*, 240.

VI. *Putting in Default.*

17. Offers to perform one's part of a contract are, according to the jurisprudence of France, either *labial* or *real*. The latter correspond to our *tender*, which, when followed by a consignment, amounts to payment. An offer may be made without a tender. *Sewell v. Willcox—Rehearing*, 87.
18. An offer by the plaintiff to perform his part of the obligation, is an indispensable preliminary to an action for the rescission of a commutative contract. *Ib.*

VII. *Damages for Non-Performance.*

19. A contractor who fails to complete a building within the time specified, will be responsible to the owner for the damage sustained by his failure to comply with his contract. *Percy v. Peyroux*, 179.

VIII. *Extinction.*

20. In general, where joint obligors or creditors unite in a common acquit-

- tance, each will be presumed to have received his share, according to the contract. Each stipulates only for himself. *Marty v. His Creditors*, 193.
21. In art. 2130 of the Civil Code, the word *co-obligee*, by an error of the press, is used for *co-obligor*. *Wiggin v. Flower*, 406.
22. The provision of art. 2130 of the Civil Code, which declares, that "an obligation may be discharged by any person concerned in it, such as a co-obligor or a security," recognizes the right of a co-obligor, surety, or any person, like them, concerned in the obligation, to pay, before his obligation becomes absolute; and the subsequent clause of the same article, which provides that payment by a person in no way concerned in the obligation does not give rise to subrogation, virtually declares that payment by a co-obligor, surety, or other person concerned in it, does create such subrogation. *Ib.*

See ALEATORY CONTRACTS.

COSTS.

See CONTRACTS, 5.

COURTS.

I. Courts Generally.

II. Supreme Court.

III. District and Probate Courts.

IV. Commercial Court of New Orleans.

V. Courts of the United States in Louisiana.

I. Courts Generally.

1. The judicial department does not pretend to the power of supervising the proceedings or acts, of the other co-ordinate branches of the government; it decides only on the rights of parties in controversies which have assumed a judicial form. When the right of a citizen to enjoy the emoluments of a particular office, is contested by another pretending to have a better right under the constitution and laws, it necessarily appertains to the judiciary to decide between them, according to the supreme law.

Nicholson v. Thompson, 367.

2. To give to a court, in any case, jurisdiction of the person, the party must have had due notice of the suit. *McNairy v. Bell*, 418.

II. Supreme Court.

3. The powers conferred on the Supreme Court, enable it to supervise the legal opinions and judgments of the inferior Judges. They do not extend to the correction of any intemperate language in which they may be expressed, or to the personal deportment of the Judges, while presiding in their respective courts. *Gove v. Breedlove*, 78.

4. The 4th section of the act establishing the Commercial Court of New Orleans, so far as it attempts to authorize the Supreme Court to decide on cases in the first instance, and to determine matters not decided on in the inferior court, is unconstitutional. The Supreme Court cannot decide on the merits of a case which has not been acted on by the lower court.

Gove v. Bredlove, 7b.

5. The Supreme Court, as the guardian of the constitutional rights of the people, is authorized to pronounce on the constitutionality of the acts of the two other departments of the government; but no act of either will be pronounced unconstitutional unless manifestly so, and the incompatibility with the Constitution must be evident.

Nicholson v. Thompson—Application for Re-hearing, 383.

III. District and Probate Courts.

6. As a general rule, Courts of Probate have exclusive jurisdiction of all claims for money against successions, administered by executors, curators, &c. (C. P. art. 924, § 13); and when a defendant dies during the pendency of a suit against him for a sum of money, the jurisdiction of the ordinary tribunals ceases, and the case must be transferred to the Probate Court of the parish where the succession is opened, to be there proceeded in. The object of the law is to bring before the Probate Court all the claims which, being subject to classification, are to be paid by the administrators under the control and supervision of that court. But the law does not extend to cases where the claim against the succession is set up by re-convention or compensation, or in which the parties have instituted separate actions against each other, which have been subsequently consolidated. In such cases, the jurisdiction of the ordinary tribunals will be maintained, where the original action was within their jurisdiction. The actions are indivisible, and must be tried together in the same court.

Bayne v. Fox, 2.

7. Where a party has been put in possession of a succession, as testamentary heir, by a decree of the Court of Probates, that court is divested of all control over the estate; and one who claims the property as the heir at law of the deceased, must proceed before the courts of ordinary jurisdiction. Nor is it requisite, before instituting such revendicatory action, that the claimant should be recognized as heir by the Probate Court; this is only required while the succession continues under the supervision of the court by which the executor, administrator, or curator was appointed. *Layre v. Pasco*, 9.
8. Where a Judge of Probates has rendered a judgment refusing to homologate the proceedings of a family meeting, he cannot be compelled by *mandamus* to do so. *State v. Judge of Probates of Jefferson*, 161.
9. Plaintiff having recovered damages in an action for a malicious prosecution tried by a jury before a Parish Court, defendant appealed to the District Court, which confirmed the judgment. There was no prayer for a trial by jury before the District Court; but defendant moved for a new trial in that court, on the ground, that the case could not be tried by it without a

- jury. The new trial was refused, and the defendant again appealed. *Per Curiam*. It was too late to ask for a jury on a motion for a new trial; and it may well be doubted whether a trial by jury can be required in the District Court, sitting for the trial of appeals. *Bouquevalle v. Young*, 169.
10. Under arts. 608 and 616, of the Code of Practice, a Court of Probates has jurisdiction to annul, or rescind decrees or judgments rendered by itself, though the controversy involve the ownership of immoveable property. *Darse v. Leumont*, 284.
11. Petitory actions, or actions of revendication, must be brought before the ordinary tribunals, even when instituted against successions. C. P. 983. *Barnes v. Gaines*, 314.

IV. Commercial Court of New Orleans.

12. An action to recover a drawback due on certain articles subject to an import duty, and for the value of merchandize detained from the plaintiff, is not an action for the recovery of damages for an offence or quasi-offence, in the meaning of the third section of the act of 14th March, 1839, ch. 17, establishing the Commercial Court of New Orleans: but is within the jurisdiction of that court. C. C. 2994 to 2304. *Gove v. Breedove*, 75.

V. Courts of the United States in Louisiana.

13. A District Court of the United States has no power to revise any decision rendered by a State court. *Harrod v. Burgess*, 449.
14. A judgment having been obtained by the United States in a District Court of the United States, against plaintiffs' testator in his lifetime, an execution was issued after his death, without any steps having been taken to revive the suit, under which property was sold by the Marshal, and purchased by defendant. In an action before a State court, by the representatives of the deceased against the purchaser, for the property: *Held*, that the act of Congress of 26th May, 1824, regulating the mode of practice in the Courts of the United States in Louisiana, having provided that it shall be conformable to the laws directing the mode of practice in the District Courts of the State, the United States had no right to execute their judgment without having instituted proceedings to revive it; and that the State court had jurisdiction to look into the proceedings of the executive officer subsequent to the judgment, to ascertain between citizens of the State, what rights had been taken from the one and given to the other. Judgment for the plaintiffs. *Garrard v. Reed*, 506.

See BANKRUPTCY, 1, 3, 11.

DAMAGES.

Damages cannot be assessed without the intervention of a jury. Art. 313, of the Code of Practice, which requires, when damages are to be assessed in confirming a judgment by default, that a jury shall be summoned to find them, as if the defendant had answered, and that the judgment shall be in

conformity with their verdict, is not repealed by the 17th section of the act of 10 February, 1841, chap. 16, which provides, that the prayer for a trial by jury, in any case before the District, Parish, or Commercial Courts of New Orleans, shall be disregarded, and the case tried by the Court, unless the party shall have advanced the compensation allowed to the jurors, in those courts, on filing his petition or answer praying for such trial.

Guillotte v. Thompson, 141.

DISCUSSION.

See SURETY, 9.

DISPOSITIONS MORTIS CAUSA.

1. A wife has no power to alienate any part of the real or personal estate of the community, or to throw any obstacle in the way of its disposition by the husband, during the existence of the community. But she may dispose of her private estate, and consequently of that portion of the community property, which, after her death and the settlement of the community, may become part of her estate. *Preston v. Humphreys*, 299.
2. Where subsequently to the date of a will by which the wife bequeathed all her interest in certain community property, but before the dissolution of the community by the death of the wife, the husband sells the property to the devisee, there is an end of the devise, which is ambulatory, and without effect until the death of the testatrix. Had there been no sale, the devisee might, after the settlement of the community, have claimed the interest under her will. *Ib.*
3. The legatees of the husband or wife, have no claim against the community until all its debts are paid. *Ib.*
4. Clauses in a will limiting the testatrix's power to dispose of the legacies after their reversion to herself, are nugatory, and do not amount to a substitution. *Barnes v. Gaines*, 314.
5. Where a testatrix directed by her will "that in case any of the legatees should die before her, the share of the deceased legatee shall go to his children, their heirs or assigns," and this direction was not changed by her, after the death of the legatee: *Held*, that this clause does not contain a substitution; that the death of either of the legatees before the testatrix, could not prevent her from disposing of her property as she pleased in favor of any other persons; and that the right of the legatee, first instituted, not having accrued, the children, the eventual legatees, would take under the will, without reference to the previous intention. *Ib.*
6. Neither the validity of a will under which a plaintiff holds the appointment of testamentary executor, nor the certificate of his appointment from the Court of Probates, can be inquired into collaterally, in a controversy between the executor and a debtor of the succession represented by him. The court cannot look beyond the certificate of his appointment, or letters testamentary; and until the will be regularly annulled, which cannot be done in

the absence of those having an interest under it, he will be entitled to exercise the powers conferred on him by law.

Maskell v. Roussell, 500.

7. In an instrument signed by the deceased and another, offered for probate as a nuncupative will by public act, the notary, after stating that the act was executed by him as dictated by the testator, in the presence of the witnesses required by law, added: "The parties dispense with the certificate required by art. 3328 of the Civil Code, and exonerate me, said notary, from all liability on account of the non-production of the same. All of which was done without interruption, and without turning aside to other acts." &c. *Held*, that the instrument is invalid as a nuncupative will by public act; that the stipulation relative to exonerating the officer from all liability in consequence of not producing the certificate required by law, is a matter *inter vivos*, foreign to dispositions *mortis causa*, having nothing to do with the formalities of the will; and that its introduction was a *turning aside to another act*, and an *interruption* of the formalities, which, were consequently not fulfilled *at one time*, as required by art. 1571 of the Civil Code.

Succession of Dough, 503.

DOMICIL.

The master and owner of a steamer plying between the port of New Orleans, and the different towns on the Mississippi, or its tributary streams, must be sued in the parish proved by witnesses to be that of his domicile; and this, though he may have declared, in the enrolment of his boat, taken out before the inception of the suit, that his usual place of residence is in the place where the action was brought. *Ricard v. Kimball*, 142.

DOTAL PROPERTY.

See HUSBAND AND WIFE.

EMANCIPATION OF SLAVES.

1. Manumission cannot be proved by parol. *Rosiné v. Bonnabel*, 163.
2. A slave who produces a receipt from his master, for a sum in full for his freedom, will not be entitled to an unconditional decree therefor; the judgment must be one ordering the defendant to emancipate him in the manner pointed out by law, unless some legal obstacle be shown to exist, connected with the conduct or character of the slave. C. C. 184, *et seq.* Acts 9th March, 1807; 31st January, 1827; 24th March, 1827; 16th March, 1830; 25th March, 1831. *Mathews v. Boland*, 200.
3. The assent of a Police Jury to the emancipation of a slave, is not an ordinance requiring the signatures of the President and Clerk on the journal to give it validity, in the meaning of the seventh section of the act of 20th March, 1816, relative to the organization and powers of Police Juries.

Fanchonette v. Grangé, 510.

4. The assent of a Police Jury is only necessary to the emancipation of a slave, when under thirty years of age. Act 31st January, 1837. Such assent when the slave is thirty years of age, is only necessary to relieve the master from giving bond to remove the slave so emancipated out of the State within one month. Acts of 16th March, 1830, and 25th March, 1831.

EVIDENCE.

- I. *Matters Judicially noticed.*
- II. *Competency of Witness.*
- III. *Examination of Witness.*
- IV. *Commission to take Testimony.*
- V. *Judicial Records and Proceedings.*
- VI. *Non-Judicial Records and other Public Instruments, and Copies thereof.*
- VII. *Private Writings.*
- VIII. *Proof of Contracts, not in Writing, over Five Hundred Dollars in value.*
- IX. *Admissibility of Parol Evidence to explain or contradict Written Instruments.*
- X. *Secondary Evidence.*
- XI. *Onus Probandi.*
- XII. *Presumption.*
- XIII. *Admissibility of Evidence under the Pleadings.*
- XIV. *Evidence of Parties.*
- XV. *Evidence in Particular Actions.*
 1. *Against master and owners of vessel where slaves found on board, without permission of owner.*
 2. *On Bills of Exchange and Promissory Notes.*
 3. *In Suits for Freedom.*
- XVI. *Rules of Evidence in Courts of the United States.*

I. *Matters Judicially Noticed.*

1. It is unnecessary, in an action on notes issued by a municipal corporation in this State, and circulated as a currency, to prove the authority of the municipal officers by whom they were signed. The circulation of such notes by the corporation is a historical fact, of which the court will take notice without proof.

D'Inwilliers v. Second Municipality of New Orleans, 123.

II. *Competency of Witness.*

2. A notary, who has given a certificate, in his official character, will not be listened to as a witness to prove its falsehood. *Mathews v. Boland, 200.*

3. Where a witness cannot be benefited by a decision, be it either way, no objection can be made to the admission of his testimony.

Bell v. Western Marine and Fire Insurance Company, 423.

III. Examination of Witness.

4. Where a witness states, that he does not know the general character and standing of a person offered as a witness, he cannot be asked whether he would believe the latter on oath. The reason of the rule is, that no one is supposed to be always ready to explain particular actions suddenly objected against, but every one is presumed always to have within reach evidence of general good character and demeanor. *Stanton v. Packer*, 108.
5. Where one seeks to discredit a witness, the proper question is, whether from his knowledge of the general character and standing of the witness, the person interrogated would believe him on oath. *Ib.*

IV. Commission to take Testimony.

6. Where a party has filed cross-interrogatories, without having required his adversary to state the names or residence of the witnesses whom he proposed to examine under a commission, or what he expected to prove by them, it will be too late at the time of the trial, to object to the admission of the testimony for the want of such statement. *Denton v. Murdock*, 127.
7. The decision in *Evans et al. v. Gray et al.*, (12 Mart. 475,) requiring the affidavit to obtain a commission to take testimony, to state the names of the witnesses to be examined, was made when no rule of court existed on the subject, and was before the promulgation of the Code of Practice, which made a change in the law on this subject, by declaring, art. 424, that such testimony "shall be taken pursuant to the rules of the respective courts." *Ib.*
8. Where it appears from the return of the Commissioner, that a witness whose deposition was taken by him, was cross-examined by a member of the bar, not the counsel of record of the party, it will be presumed that he had authority to appear, either from the client, or his counsel of record, unless his authority be denied on oath. *Kelley v. Benedict*, 138.
9. The return of "not found" on a subpoena for a witness, and proof that he resides out of the State, will authorize the admission of his testimony taken under a commission. *Ib.*
10. Service of interrogatories to be propounded to a witness under a commission, may be either on the adverse party, or his counsel. No written notification to either is required. C. P. 426. Act 25th March, 1828, chap. 83, § 7. *Hallock v. Caruthers*, 190.
11. A commission to take testimony, addressed to a vice-consul of the United States or a commissioner named by the court, returned executed, under his signature as commissioner, is admissible on proof of his signature, and of his having been reputed, and having acted as such vice-consul at a period prior to the execution of the commission. *Stiff v. Nugent*, 217.

V. *Judicial Records and Proceedings.*

12. The inventory taken after the death of a wife, is not evidence against the creditors of the husband, either of the existence, or payment of a debt alleged to be due to the community. *Norris v. Carrahy*, 292.
13. A judgment rendered in another State against a defendant not a resident of that State, is not admissible in evidence against him, unless it be shown, that he was cited, or had appeared. Without service of citation, or appearance, a judgment is, *per se*, of no effect. *McNairy v. Bell*, 418.

VI. *Non-Judicial Records and other Public Instruments, and Copies thereof.*

14. The laws of foreign States may be proved by parol, unless they appear to be statutory or written law. *Rosine v. Bonnabel*, 163.
15. Parol evidence is admissible to prove that, by the laws of Spain, a copy of a judicial proceeding, certified by a notary public of the Cabildo, under his signature and *peraph*, his capacity being attested by three other notaries, certifying that his acts are entitled to full faith and credit, would be admissible in any Spanish tribunal. Such evidence having been introduced, proof of the capacity and signatures of the notaries, is all that is necessary to the authentication of the copies. Since the act of 28th February, 1837, ch. 38, requiring "the courts of this State to receive the attestation or certificate of any American consul, general consul, vice-consul, or commercial agent, residing in any foreign country, as legal evidence of the attributes, and official station or authority of any magistrate or other civil officer in such foreign country, under the laws thereof," parol proof of such capacity, which is essentially secondary evidence, is inadmissible; but proof under the great seal of the nation is still good. The capacity and signatures of notaries to copies made out before the act of 1837, may still be proved by parol, under the decision in *Las Caygas v. Larienda's Syndics*, (4 Mart. 283.) *Ib.*
16. It is only the attributes and official station of foreign civil officers which are required, by the act of 28th February, 1837, to be proved by the consular certificate, or that of a commercial agent. Parol evidence is admissible to prove the laws of a foreign country, not shown to be statutory or written, relative to the forms of authentication of copies of judicial proceedings. *Ib.*
17. The acts of foreign notaries do not prove themselves, except as to the protests of foreign bills of exchange. *Ib.*
18. One, not a party to a notarial act, may prove its falsehood by competent evidence. *Mathews v. Boland*, 200.
19. An order of a Spanish Governor of the province of Louisiana authorizing the oath of allegiance to be administered to a party, and directing him to be maintained in the possession of certain lands, is a public and official act, of which a copy is admissible in evidence. It is not necessary that the original should be produced. Such an act was correctly deposited and recorded

in the office of the Parish Judge of the parish in which the land lies, and he is authorized to certify copies thereof.

Murdock v. Gurley—Application for Re-hearing, 467.

VII. *Private Writings.*

20. Neither the wife, nor her heirs, are third persons as to the husband, in relation to acts done by him as the head of the community. Domestic papers admissible against the husband, are so against the wife, or her heirs.

Caldwell v. Hennen, 20.

21. In general, where joint obligors or creditors unite in a common acquittance, each will be presumed to have received his share, according to the contract. Each stipulates only for himself. *Marty v. His Creditors, 193.*

22. A statement of accounts between the husband and a third person, is not evidence against the creditors of the husband, either of the existence, or payment of a debt alleged to be due to the community.

Norris v. Carraby, 292.

23. The written acknowledgment of the husband is not conclusive, as to third persons, of the amount of the dotal rights of the wife. The amount must be established contradictorily with them, and by conclusive proof.

Dimitry v. Pollock, 347.

VIII. *Proof of Contracts, not in Writing, over Five Hundred Dollars in value.*

24. The testimony of a single witness, unsupported by corroborating circumstances, is insufficient to prove a contract, not reduced to writing, to pay a sum of money where the amount exceeds five hundred dollars. C. C. 2257.

Derbes v. Dicuier, 491.

IX. *Admissibility of Parol Evidence to explain or contradict Written Instruments.*

25. The provision of art. 2256 of the Civil Code, that "parol evidence shall not be admitted against or beyond what is contained in the acts, nor on what may have been said before, or at the time of making them, or since," is not confined to acts relative to the transfer of immoveable property or slaves, nor to authentic acts. *Knox v. Liddell, 111.*

26. Parol evidence is inadmissible to prove the cancelling of written contracts. Such evidence is inadmissible against a written contract; and proof that it was cancelled, is the strongest evidence that can be given against it.

Sharkey v. Wood, 326.

27. Parol evidence of the admissions of a party, tending to contradict positive written evidence, such as the enrolment of a steamer, is inadmissible.

Clark v. Slidell, 330.

28. Parol evidence is admissible to establish the truth or falsehood of a representation made to obtain a policy, or to show who is included in a policy made for the benefit of whom it may concern. But where a party is expressly named, and his interest specified, or legally understood or presumed,

the policy cannot be changed or altered by parol evidence, unless on an allegation of fraud, error, or other legal cause.

Bell v. Western Marine and Fire Insurance Co., 423.

X. Secondary Evidence.

29. A copy of a bill of sale, certified by the Register of a county in another State, as made from the records of his office books, in which it was transcribed, on a certificate from the Clerk of the County Court of that county, that it had been proved before him by the two subscribing witnesses thereto, is inadmissible, being but a copy of a copy, and the evidence disclosing the existence of the original, which was not produced.

Wells v. McMaster, 154.

30. Parol evidence is inadmissible to establish a fact of which it appears that the party had written evidence, not accounted for.

Rosine v. Bonnabel, 163.

31. The best evidence which the nature of the case admits of, must be produced. Loose admissions, or conversations of parties, cannot supply the absence of documentary evidence, when in existence. The documents themselves must be produced, unless their loss is satisfactorily proved, or their absence clearly accounted for, and then their contents must be established. *Clark v. Slidell*, 330.

XI. Onus Probandi.

32. To recover in an action for the difference between the price for which a slave was sold to the defendant, and that subsequently obtained on a sale made at the purchaser's risk, on his failure to comply with the terms of the first sale, where there is a general denial, plaintiff must prove that defendant was put in mora before the second sale. *Petit v. Leville*, 117.

33. The party interested in establishing that a rule of an inferior court has been violated, must show its existence by the record.

Denton v. Murdock, 127.

34. One claiming under a bill of sale, signed by an attorney in fact of the vendor, must prove the authority of the attorney. *Wells v. McMaster*, 134.

35. In an action against defendants, for damages on account of an injury done to plaintiff's boat by a steamer alleged to belong to the former, who pleaded the general issue, proof that defendants were owners of the steamer, is necessary to a recovery; and where the omission of evidence of ownership was attributable to the oversight of the plaintiff's attorney, the case will be remanded to obtain such proof.

Riley v. City of Louisville, 154.

36. To recover in a redhibitory action, the purchaser must prove that the alleged vice or malady existed before the sale to him, unless it makes its appearance within the three days immediately following the sale; in which case, it will be presumed to have existed before. C. C. 2508.

Fox v. Walsh, 222.

37. Proof of the promise of a purchaser at an auction sale, to pay any loss that may result from a re-sale of the property on his account, and of his

- authority to the auctioneer to do the best he could with the property, will dispense with the evidence which would otherwise be necessary in an ordinary case of sale à la folle enchère. *Forsyth v. Wilkinson*, 263.
38. Where plaintiff, who had been employed by defendant as a physician, sues for the value of his services, and defendant pleads that plaintiff was not licensed to practice, the burthen of proving that he was not so authorized will be on the defendant, he having employed the plaintiff as such. *Dickerson v. Gordy*, 459.
39. Against a mere trespasser without right, a plaintiff need only show a *prima facie* title. *Fanchonette v. Grangé*, 510.

XII. Presumption.

40. Every thing left at the dissolution of the community is presumed to be common, unless it be proved what each spouse brought in. This proof is not required to be by an authentic instrument contemporaneous with the marriage; any legal evidence is admissible. The community, as established by the Spanish law, and the code of 1808, remains unchanged in this respect. Whatever either party brought in, is to be deducted from the mass, and the balance alone divided. It will not suffice to show, that either party was possessed of particular property, or had a sum of money previous to the marriage; it must be shown, that it belonged to him at the time of its celebration. An authentic act passed between the parties to a marriage, will not be conclusive against third persons, as to the property possessed by either at the time of such marriage. *Norté v. Carraby*, 292.
41. Where it is proved, that notes due to the community were discounted by the husband who received the proceeds, they must be charged to him in a settlement of the community, though no proof was offered of their having been paid by the makers. He should be charged with the amount, unless it were shown that, on a failure of the makers to pay, he was forced to do so. *Id.*
42. Where one stands by, and sees his property sold under legal process, without making his claim known, or objecting thereto, he will be bound by the sale. *Beach v. McDonough*, 352.
43. One who stands by in silence, while his own property is sold, and suffers another to become the purchaser, will be estopped from disputing a title so acquired. *Marsh v. Smith*, 518.

XIII. Admissibility of Evidence under the Pleadings.

44. In an action for a rescission of a purchase made by plaintiffs of defendant's interest in a partnership existing between them, as to the value of which they were deceived by the fraudulent representations of the latter, for a dissolution of the partnership on account of fraud, and for an account: *Held*, that the main issue between the parties being one of fraud, a document showing exorbitant and unfair charges by plaintiffs for merchandize furnished by them to the partnership, was admissible in evidence under the issue.

Littlefield v. Beamis, 145.

45. Where it is admitted, that an award was made without the arbitrators having been sworn, parol evidence of their proceedings is inadmissible.

Starkey v. Wood, 326.

46. In an action for damages for a malicious prosecution, a defendant may, under the general issue, offer in mitigation of damages, evidence of circumstances calculated to show that he had just cause to suspect the plaintiff of the offence with which he was charged. All the circumstances attending the transaction tending to show the defendant's motives, ought to be inquired into. *Hitchcock v. North*, 328.

47. In an action against a corporation, based on alleged acts of fraud and deception, on the part of the directors, collectively and individually, evidence is admissible of the acts and declarations of individuals who were, at the time of such acts and declarations, directors and concerned in the alleged fraud. Such acts and declarations, having been made before, and at the time of the transaction, are part of the *res gesta*.

Marigny v. Union Bank of Louisiana, 354.

XIV. Evidence of Parties.

48. Extra-judicial admissions of parties, particularly those made in loose conversations, are the worst species of evidence, and entitled to little weight, unless it be impossible to procure any other. *Clark v. Slidell*, 330.

49. Where a party to an action is ordered to answer in open court, interrogatories propounded to him by the opposite party, and the latter fails to have a day fixed for answering them, they cannot, on the failure of the former to answer, be taken for confessed. C. P. 351. *Derbes v. Décur*, 401.

XV. Evidence in Particular Actions.

1. Against Master and Owners of Vessel where slaves found on board without permission of Owner.

50. Under the first section of the act of 25th March, 1840, the testimony of a witness employed on any steamer or other vessel, on board of which a slave shall have been found, without the written consent of his or her owner, is inadmissible to destroy the legal presumption, established by that act, that the master and owners have received, or hidden, or suffered such slave to remain on board with the intention of depriving the owner thereof, or of transporting him or her out of the State, or from one part thereof to another; but it is admissible to disprove any statements in relation to the facts out of which this presumption grows, such as the finding of the slave on board, the taking from some point within the State, &c. *Feltus v. Anders*, 7.

51. The presumption created by the first section of the act of 25th March, 1840, chap. 80, amending the acts previously in force relative to the transportation of slaves out of the State, against the will of their owners, does not exist, where a runaway slave, concealed on board of a vessel, is discovered by the captain, and not by the owner of the slave, and the former pursues the course pointed out by law, for restoring the slave to his owner, and the latter actually recovers possession of him. *Winston v. Foster*, 113.

2. On Bills of Exchange and Promissory Notes.

52. Where the act of mortgage shows that a note secured by it was endorsed when the act was executed, and the note, with the endorsement on it, was delivered to the mortgagor by the mortgagee, the signature of the endorser need not be proved. *Succession of Porter*, 96.
53. Proof of written notice to the endorser of a note of its non-payment by the makers, and of protest, is necessary to a recovery against him.

McKee v. Dubois, 421.

3. In Suits for Freedom.

54. Manumission cannot be proved by parol. *Rosine v. Bonnabel*, 163.

XVI. Rules of Evidence in Courts of the United States.

55. The provision of the fourth section of the act of Congress, of the 25th April, 1812, declaring that no grant, order of survey, deed, conveyance, or other written evidence, which shall not be recorded as directed by that act, shall be admitted as evidence in any court of the United States, against any grant which may be derived from the United States, establishes a rule of evidence for the courts of the United States; but the rule has no binding authority over the courts of the States.

Murdock v. Gurley—Application for Re-hearing, 467.

EXCEPTION.

See PLEADING, IV.

EXCEPTIONS, BILL OF.

1. Bills of exception should be signed by the Judge, before signing the judgment. *Coffin v. Pollard*, 124.
2. A party dissatisfied with the charge of the Judge to the jury, must require him to give his opinion in writing, and except to it before the jury retires; it cannot be done afterwards. *A fortiori*, is he precluded from making the charge a ground for a new trial, unless excepted to in due time. C. P. 517.
- Penn v. Collins*, 213.
3. Where a bill of exceptions is not mentioned in the argument, nor otherwise insisted on before the Supreme Court, it will be considered as waived.

Murdock v. Gurley—Application for Re-hearing, 467.

EXECUTOR.

See SUCCESSIONS.

EXECUTORY PROCESS.

The consent of the mortgagee to the sale of property mortgaged with the clause *de non alienando*, evidenced by joining in the act of sale, is a waiver

of the right of the direct action, and he cannot afterwards proceed without notice to those who may have subsequently acquired rights. Any proceedings must be against the third possessors of the property.

City Bank of New Orleans v. Walton, 158.

FIDEI-COMMISSUM.

Nothing in the laws of this State prohibits a party from holding in his own name lands belonging to another, subject to the order of the latter. Such an arrangement has no analogy to the *fidei-commissa* abolished by the Civil Code. By the latter, the trustee is bound to retain for, and deliver to a third person, the thing confided to him, which is placed beyond the control of the person creating the trust. *Caldwell v. Hennen*, 20.

FIERI FACIAS.

1. Where one against whom a *fi. fa.* has been issued, hands to the officer about to make a seizure, certain notes, circulating as currency, in the presence of a third person, who asserts that he is the owner of them, but does not insist on the officer's desisting from taking them away, he will forfeit any claim he may have to them. *Levistones v. Claiborne*, 196.
2. The obligation of the plaintiff in a *fi. fa.*, to refund to the purchaser on his eviction, the money received by the former, is merely statutory, (C. P. 711, *et seq.*) and it cannot be extended further than to the reimbursement of the price paid by the purchaser, and received by the plaintiff, or which might have been received by him but for his own neglect; but the purchaser may recover from the defendant in the execution, the whole sum paid by him. He is entitled to a joint action against both the parties to the execution—against the plaintiff, for the amount received by him, and against the defendant, for the whole sum paid.

Cleary v. Second Municipality of New Orleans, 247.

FOREIGN LAWS.

The laws of foreign States may be proved by parol, unless they appear to be statutory or written law. *Rosine v. Bonnabel*, 163.

FRAUD.

In an action against a corporation, based on alleged acts of fraud and deception, on the part of the directors, collectively and individually, evidence is admissible of the acts and declarations of individuals who were, at the time of such acts and declarations, directors, and concerned in the alleged fraud. Such acts and declarations, having been made before, and at the time of the transaction, are part of the *res gesta*.

Marigny v. Union Bank of Louisiana, 354.

GOVERNOR AND SENATE.

1. Under the Constitution of this State, the Governor and Senate have no authority to remove an incumbent, where the duration of the office has been determined by law whether for a term of years, or during good behavior.
Nicholson v. Thompson, 367.
2. The Governor has no right to remove an officer during the recess of the Senate. He alone can, in no case, create a vacancy. Nor can he make any appointment to office, without the advice and consent of the Senate, except where a vacancy has occurred during the recess, and then only until the end of the next session of that body. *Ib.*
3. Neither the Governor of this State, nor the Governor and Senate, have any right of removal, as incidental to their power of appointment to office.
Ib.

HUSBAND AND WIFE.

- I. *Dotal and Paraphernal Property, and of the Wife's Mortgage and Privilege.*
 - II. *Community of Gains.*
 - III. *Contracts of the Wife.*
 - IV. *Actions by the Wife.*
1. *Dotal and Paraphernal Property, and of the Wife's Mortgage and Privilege.*
 1. The written acknowledgment of the husband is not conclusive, as to third persons, of the amount of the dotal rights of the wife. The amount must be established contradictorily with them, and by conclusive proof.
Dimitry v. Pollock, 347.
 2. The legal mortgage of the wife on the property of the husband, to secure her paraphernal rights, or for the reimbursement of her paraphernal funds paid to him, or applied to the discharge of his debts, only attaches from the date of such payment or application, or from the time when her paraphernal property was placed under his administration, or in his possession. *Ib.*
 3. Neither the wife with her legal mortgage and privilege on the property of her husband, nor any other person holding a general or special mortgage, though entitled to be paid by preference out of the proceeds, can prevent an inferior mortgagee from causing the property subject to his mortgage to be sold. C. C. 3945, 3949. C. P. 710, 713, 714, 715. Under arts. 396, 401 and 403 of the Code of Practice, a third person may oppose the payment of the price to the seizing creditor, when he claims a preference on the proceeds, and the court may order the amount to be retained by the Sheriff subject to its order. *Vanhille v. Her Husband*, 496.
 4. A wife cannot claim the proceeds of property sold at the suit of a creditor of her husband, or exercise her action of mortgage against property in the hands of a third person, if the latter prove that there is other property sub-

ject to her lien in possession of the husband, or since sold, which she is bound to discuss. *Id.*

II. Community of Gains.

5. Where one claims, as the heir of his mother, against a third person in possession, property which belonged to the community of *acquêts* existing between his parents, he must show that his father had such a title, at the dissolution of the community, as would have enabled him, in his own right and as tutor of his son, to maintain a petitory action for the property; for if any contracts or engagements were entered into by the father, during the existence of the community, which were binding on him, showing that his apparent title was not a real one, whether evidenced by private writings shown to exist, and proved by extrinsic evidence to have a real date, or by authentic acts, they must have been binding on the community, and descended to the heir of the wife as a necessary burden upon his inheritance, estopping him from disturbing a title derived from the community.
Caldwell v. Hennen, 90.
6. Neither the wife, nor her heirs, are third persons as to the husband, in relation to acts done by him as the head of the community. Domestic papers admissible against the husband, are so against the wife, or her heirs. *Id.*
7. Personal property of the parties before marriage, did not, under the Spanish law, become the property of the community, in consequence of the neglect to establish the amount at the time of the marriage.
Nord's v. Carraby, 203.
8. Every thing left at the dissolution of the community is presumed to be common, unless it be proved what each spouse brought in. This proof is not required to be by an authentic instrument contemporaneous with the marriage; any legal evidence is admissible. The community, as established by the Spanish law, and the code of 1808, remains unchanged in this respect. Whatever either party brought in, is to be deducted from the mass, and the balance alone divided. It will not suffice to show, that either party was possessed of particular property, or had a sum of money previous to the marriage; it must be shown, that it belonged to him at the time of its celebration. An authentic act passed between the parties to a marriage, will not be conclusive against third persons, as to the property possessed by either at the time of such marriage. *Id.*
9. Neither the inventory taken after the death of a wife, nor a statement of accounts between the husband and a third person, are evidence against the creditors of the husband, either of the existence, or payment of a debt alleged to be due to the community. *Id.*
10. Where it is proved, that notes due to the community were discounted by the husband who received the proceeds, they must be charged to him in a settlement of the community, though no proof was offered of their having been paid by the makers. He should be charged with the amount, unless it were shown that, on a failure of the makers to pay, he was forced to do so.
Id.
11. A wife has no power to alienate any part of the real or personal estate of

the community, or to throw any obstacle in the way of its disposition by the husband, during the existence of the community. But she may dispose of her private estate, and consequently of that portion of the community property, which, after her death and the settlement of the community, may become part of her estate. *Preston v. Humphreys*, 299.

12. Where subsequently to the date of a will by which the wife bequeathed all her interest in certain community property, but before the dissolution of the community by the death of the wife, the husband sells the property to the devisee, there is an end of the devise, which is ambulatory and without effect until the death of the testatrix. Had there been no sale, the devisee might, after the settlement of the community, have claimed the interest under her will. *Id.*

13. The legatees of the husband or wife, have no claim against the community until all its debts are paid. *Id.*

III. Contracts of the Wife.

14. A married woman has no mortgage on the real estate of her husband, for the reimbursement of money paid by her as his co-obligor *in solido*, where the law authorized her to join in the contract.

Arrieux v. Dugas.—Rehearing, 457.

15. A woman of full age, not under the control of a husband, stands on the same footing as any other person able to contract. She will be presumed to have intended to bind herself in the manner in which she actually bound herself, and will not be listened to when she simply alleges that she acted inadvisedly, and without sufficient information. C. C. 1775.

Dugat v. Comeau, 475.

IV. Actions by the Wife.

16. Where the petition of a married woman alleges, that she is authorized by her husband to sue, proof of authorization will only be required when specially denied *in limine litis*. *Succession of Porter*, 96.

HYPOTHECARY ACTION.

See EXECUTORY PROCESS.

INJUNCTION.

One making a third opposition is not required to make an oath in order to obtain an injunction. C. P. 399. *Vidal v. Ocean Insurance Company*, 68.

INSOLVENCY.

1. The act of Congress of 19th August, 1841, establishing a uniform system of bankruptcy suspended, if it did not abolish, all the laws of the different States relative to insolvent debtors, taking away the jurisdiction of their

tribunals, and establishing others in their place, with ample and exclusive powers over every question touching the property surrendered by a bankrupt, its sale, and the disposition of the proceeds. The State courts have, consequently, no jurisdiction, and cannot interfere between a creditor put on the list of a bankrupt and his assignee, in any matter relating to the final liquidation of the estate surrendered. The decree of bankruptcy operates as a stay of all proceedings. *Clarke v. Rosenda*, 37.

2. Any contract or agreement between an insolvent and one of his creditors, the effect of which is to secure to the latter an undue preference over the other creditors, or to procure for him a renewed claim upon the future property of the debtor, in consequence of which agreement, the preferred creditor's opposition is withdrawn, is illegal and fraudulent, and cannot be enforced. It matters not as to the nature of the opposition, if its withdrawal be the consideration or cause for which the preference is given. Thus, an agreement in consideration of the withdrawal of an opposition to the sufficiency of the security offered by an insolvent, who had been appointed syndic of his own creditors, though the opposition was made after the insolvent had obtained his discharge, of the benefit of which he could not be deprived by any subsequent opposition, is illegal and void. It is sufficient that an undue advantage is derived from it by one of the creditors. The object of the law is, that the rights of all the creditors should remain in the state they were in, at the time of the insolvency; that no change should take place so as to favor any; and that the effects surrendered, and the property subsequently acquired, should be equally divided between the insolvent's former and subsequent creditors, according to the nature, rank, and origin of their respective claims at the time of the surrender, or of the contracting of the subsequent debts. *Slidell v. Pritchard*, 101.
3. Money paid to a creditor, in pursuance of an illegal agreement with an insolvent, who had been appointed the syndic of his own creditors, to secure the payment of the creditor's claim, in consideration of his withdrawing an opposition to the sufficiency of the security offered by the syndic, cannot be recovered back, either by the debtor, or by an assignee of his property, under a bankrupt law, suing for the benefit of the creditors, or by a security, who may have paid the amount so reclaimed. Though the cause of the agreement was unlawful, it originated in a natural obligation, on which no action could be founded, but which sufficed to prevent the recovery of the money back, when once paid. *C. C. 2281, 2382. Ib.*
4. The State tribunals were not deprived, by the bankrupt law of 19 August, 1841, of any portion of their jurisdiction, necessary to the final administration of the estates of insolvents who had made a surrender of their property previous to its passage. A State court, in which a surrender was made, has authority to decide, between the syndic of the creditors under the cession in the State court, and an assignee subsequently appointed by the United States Court under the bankrupt act, the right to property alleged to have been ceded under the State law, but afterwards placed on the schedule of the debtor, on his application to be declared a bankrupt.

West v. His Creditors, 261.

5. A mortgage obtained by a creditor who knew of the insolvency of the debtor at the time, is null as to other creditors, so far as it gives the mortgagee any advantage over them, though executed more than three months before the failure. C. C. 1979. Where the only objection to such a contract is the undue preference, the action to rescind is prescribed by one year.

Prats v. His Creditors, 388.

6. Where a debtor has made a *cessio bonorum*, all his debts, whether payable then or at a future period, are placed on the same footing, the latter being reduced in proportion to the distance of the day of payment. All the creditors, including those whose debts were payable at a future time, are entitled to a voice in fixing the terms of sale; nor will the consent of a creditor to the sale of the property on a credit, be considered an extension of the time of payment, so as to release others bound with the insolvent as endorsers or sureties. *Léger v. Arceneaux*, 513.

INSURANCE.

1. The contract of assurance must always be made in writing. The terms of the contract must be sufficiently expressed, every necessary stipulation being inserted. The policy is the contract between the parties, and, as a general rule, all proposals or conversations prior to the subscription, are considered as waived, if not inserted in the policy, or in a memorandum annexed to it. Correspondence, or other communications cannot be referred to, unless to explain some ambiguity, or to sustain an allegation of error or fraud, or some fact that would have affected the risk.

Bell v. Western Marine and Fire Insurance Company, 423.

2. Parol evidence is admissible to establish the truth or falsehood of a representation made to obtain a policy, or to show who is included in a policy made for the benefit of whom it may concern. But where a party is expressly named, and his interest specified, or legally understood or presumed, the policy cannot be changed or altered by parol evidence, unless on an allegation of fraud, error, or other legal cause. *Ib.*

3. Policies of insurance are to be construed like any other written contract, in which the intention of the parties must be sought in the instrument itself. Plain mistakes, and frauds, may be corrected. *Ib.*

4. All losses or risks may be insured against, except such as are forbidden by public policy, or positive prohibition, or those occasioned by the misconduct or fraud of the insured. *Ib.*

5. It is essential to the contract of insurance, that there should be an interest at risk; but not that the thing insured should have what is properly called a value, or price, or be assignable. *Ib.*

6. Policies may be effected on a future interest, but the interest must subsist at the time of the loss, to give rise to a claim for indemnity. *Ib.*

7. A mortgagee, or creditor having a lien on property, has an insurable interest. It makes no difference that a superior lien exist in favor of another, if anything remains for the insured. A lien, which is invalid, will not cre-

- ate an insurable interest; but it is sufficient, if it can be enforced between the contracting parties. Thus the interest of the mortgagee in an unrecorded mortgage, is an insurable one, though the mortgage would be without effect as to third persons. *Ib.*
8. The interest of the party by whom property is held as security, is an insurable one. Hence the right of agents, consignees and factors, to insure the goods of their principals. *Ib.*
9. Where the policy on a steamer, obtained by the owner, does not prohibit him from selling, he can do so without forfeiting it, if the insurers are not thereby put in a worse situation; and where he retains a mortgage, or a privilege thereon as vendor, he will have an insurable interest, and may recover on the policy. It is not necessary that the interest at the time of the loss, should be the same as that existing when the policy was obtained. *Ib.*
10. A general description of the thing insured is sufficient. One owning but a part of a ship, or of a quantity of goods, or a mortgagee, may insure generally, without specifying his interest. *Ib.*
11. An application for insurance for whoever it may concern, is sufficient notice to put the insurers on their guard, and to throw upon them the obligation of inquiring further, if other information be desired. *Ib.*
12. A deviation is the increasing, or varying of the risk insured against, without necessity, or reasonable cause. *Ib.*
13. Where a boat, on which insurance had been effected by an owner or vendor retaining a privilege, is removed to the opposite side of the river by the Marshal of a court in which she had been libelled, and there kept by him, there being no proof that the risk was at all increased, it will not amount to such a deviation as to forfeit the policy; nor will it be forfeited by the fact that she had not a captain and crew on board when so laid up. When on a voyage, or in a port receiving or discharging cargo, a boat should be properly manned and officered; but it is neither usual, nor necessary, when laid up. *Ib.*

INTEREST.

1. Where a purchaser at a credit sale, availed himself of the privilege of paying cash, on being allowed a deduction at the rate of eight per cent per annum, from the price for such advance, this circumstance will not entitle him, on obtaining a rescission of the sale, to claim interest at that rate.
Dowlin v. New Orleans and Nashville Rail Road Company, 5.
2. Interest is due, from judicial demand, on an amount recovered as damages for property lost by a common carrier. The sum claimed arises out of a contract, though the amount due was unliquidated. *Clines v. Frisbee, 192.*
3. In an action, by the purchaser, for damages in consequence of the inferiority of the article to that of the samples by which it was sold, interest may be recovered, at five per cent, from judicial demand, but not from the date of the purchase. *Stiff v. Nugent, 217.*

4. Interest is a matter of law, and when arising, *ex mora*, is in the nature of damages for non-payment of money due by contract. *Id.*

See COMMERCIAL BANK OF NEW ORLEANS, 2.

INTERPRETATION.

1. The rules which govern in the construction of a statute, are applicable to the Constitution, when supposed to conflict with an act of ordinary legislation. *Nicholson v. Thompson*, 367.
2. Natural and well ascertained objects must control in the location of claims to land. Specified courses and distances must yield to them, if they cannot be reconciled. *Le Breton v. Lewis*, 479.
3. Inaccurate or ungrammatical language in the certificate of a notary, will not vitiate it, where the meaning is obvious.

New Orleans Gas Light and Banking Company v. Hudson, 486.

INTERROGATORIES.

See EVIDENCE, XIV.

INTERVENTION.

See PLEADING, 9.

JOINT OBLIGORS.

See CONTRACTS, II.

JUDGMENT.

1. A rule having been taken on the surety in an attachment bond to show cause why he should not pay the amount of the judgment against his principal, the former, on the return day of the rule, demanded to see the bond, which, having been misplaced, could not be produced; and the parties separated, the rule not having been discharged, made absolute, or extended. Judgment having been afterwards rendered in favor of the plaintiff in the rule, without further notice to defendant, in an action by the latter to annul: *Held*, that a new rule should have been taken, and that the judgment must be annulled. *McKeever v. Keyes*, 61.
2. The neglect to record a judgment in the office of the Recorder of Mortgages, within ten days from the time it was rendered, as directed by the act of 26th March, 1813, does not prevent it from having the effect of a legal mortgage from the date of its registry, when made after the ten days have elapsed. *Lachomette v. Thomas*, 172.
3. In actions on joint obligations, judgment must be against each defendant separately for his portion, but, *in solido*, for the costs. *C. C. 2080, et seq.*
Duggan v. De Lizardi, 274.

4. Under arts. 608 and 616, of the Code of Practice, a Court of Probates has jurisdiction to annul or rescind decrees or judgments rendered by itself, though the controversy involve the ownership of immoveable property.
Darse v. Leaumont, 284.
5. A fraud perpetrated by the machinery of a judgment, where the court was made the unconscious instrument, is as liable to be annulled as when effected in the usual form of a contract. *Prats v. His Creditors*, 288.
6. A judgment rendered in another State against a defendant not a resident of that State, is not admissible in evidence against him, unless it be shown, that he was cited, or had appeared. Without service of citation, or appearance, a judgment is, *per se*, of no effect. *McNairy v. Bell*, 418.
7. The statute of the State of Tennessee, authorizing sureties who have paid the debt of their principal, to obtain judgment against the latter, by motion, without notice to him, and on the verdict of a jury convened to try the fact of suretyship, can only operate, within that State, on citizens or residents thereof. It cannot empower citizens of that State to obtain judgments against non-residents. *Id.*
8. No particular form is necessary to a confession of judgment. Any admission of the debt sued for, which is such, that it leaves no issue to be tried, is, in fact, a confession of judgment. If the admission goes only to a part of the sum claimed, it is a confession, *pro tanto*; and there is no reason why the creditor should be delayed in the collection thereof, until a decision be had on the disputed portion. *Skinner v. Dameron*, 447.
9. A judgment rendered in a State court against a party declared a bankrupt under the act of Congress of 1841, and to whom an assignee had been appointed, without such assignee having been made a party, is a nullity.
Harrod v. Burgess, 449.
10. In an action for the price of a slave, resisted on the ground of a suit for freedom having been instituted by such slave, for the purposes of justice the court may order a stay of execution till security be given against the danger of eviction, though not prayed for in the answer, and even though there be no prayer by defendant for general relief. *Carson v. Dwight*, 484.
11. A judgment having been obtained by the United States in a District Court of the United States, against plaintiff's testator in his lifetime, an execution was issued after his death, without any steps having been taken to revive the suit, under which property was sold by the Marshal, and purchased by defendant. In an action before a State court, by the representatives of the deceased against the purchaser, for the property: *Held*, that the act of Congress of 26th May, 1824, regulating the mode of practice in the Courts of the United States in Louisiana, having provided that it shall be conformable to the laws directing the mode of practice in the District Courts of the State, the United States had no right to execute their judgment without having instituted proceedings to revive it; and that the State court had jurisdiction to look into the proceedings of the executive officer subsequent to the judgment, to ascertain between citizens of the State, what rights had

been taken from the one and given to the other. Judgment for the plaintiffs. *Garrard v. Reed*, 506.

JURY.

1. A judge has no right in the capacity of clerk to the jury, even at their request, to draw up a verdict for them. He may instruct them as to the form of their verdict, (C. P. 515, 528;) but it is the duty of the foreman to prepare it. *Ib.* 524. The Judge may tell them, that it is in their power to find either a general, or a special verdict, but it is for them to determine which they will find. *Ib.* 519, 521, 524. *Gove v. Breedlove*, 78.
2. In a charge to the jury, the Judge must limit himself to giving them a knowledge of the law applicable to the case, abtaining from saying any thing about the facts, or even recapitulating them in such a way as to exercise any influence on their decision. Nor ought he to state his own conclusions from the evidence. *Ib.*
3. Damages cannot be assessed without the intervention of a jury. Art. 313, of the Code of Practice, which requires, when damages are to be assessed in confirming a judgment by default, that a jury shall be summoned to find them, as if the defendant had answered, and that the judgment shall be in conformity with their verdict, is not repealed by the 17th section of the act of 10th February, 1841, chap. 16, which provides, that the prayer for a trial by jury in any case before the District, Parish, or Commercial Court of New Orleans, shall be disregarded, and the case tried by the court, unless the party shall have advanced the compensation allowed to the jurors, in those courts, on filing his petition or answer praying for such trial.
Guillotte v. Thompson, 141.
4. It is no ground for a new trial, that a juror took up and looked over certain balance sheets, which had been rejected as inadmissible, in an action for the dissolution and settlement of a partnership, where the counsel of the party against whom they were offered, noticed the fact at the time but made no objection, and the papers were not taken by the jury into their room, and it was not shown that their contents were communicated to the other jurors, or that they did or could exercise any influence over the jury in making up their opinions. *Littlefield v. Beamis*, 145.
5. No law requires that a jury shall carry with them into their consultation room all the documents and papers submitted to them. It is at their pleasure to do so, or not. *Ib.*
6. Plaintiff having recovered damages in an action for a malicious prosecution tried by a jury before a Parish Court, defendant appealed to the District Court, which confirmed the judgment. There was no prayer for a trial by jury before the District Court; but defendant moved for a new trial in that court, on the ground, that the case could not be tried by it without a jury. The new trial was refused, and the defendant again appealed. *Per Curiam*. It was too late to ask for a jury on a motion for a new trial; and it may well be doubted whether a trial by jury can be required in the District Court sitting for the trial of appeals. *Bouquevalle v. Young*, 163.

7. A party dissatisfied with the charge of the Judge to the jury, must require him to give his opinion in writing, and except to it before the jury retires; it cannot be done afterwards. *A fortiori*, is he precluded from making the charge a ground for a new trial, unless excepted to in due time. C. P. 517.

Penn v. Collins, 213.

8. The verdict of a jury will not be disturbed, unless clearly erroneous, especially when pronounced upon questions of fraud.

Barnett v. His Creditors, 291.

LETTING AND HIRING.

I. Letting of Things.

II. Hire of Labor or Industry.

I. Letting of Things.

1. Where the lessors of property, without the consent of the sureties of the lessees, take back a part which had been occupied by the lessees as a dwelling, and relet it to a third person, the sureties will be released, the contract being materially altered without their assent. *Per Curiam*. It must be presumed, that the sureties consented to bind themselves in relation to the situation of the whole property at the time of the lease, and in consideration of the subrogation to which they were legally entitled to the lessor's rights and privileges, among others, upon the furniture which existed in the dwelling house. C. C. 2676, 2676, 2677, 2679, 3030. *Penn v. Collins*, 213.

2. Where the lessors of property, having sued the lessees for the rent due, and to come due under the contract, and caused property, on which they had the lessors' privilege, to be seized to an amount equal to the rent due, and to come due, abandon the seizure without a trial, the sureties of the lessees will be discharged. *Id.*

3. The lessee of a part of a building, in which, by the regulations of the lessors, sales at auction were to be made, cannot maintain an action against a sheriff for making his sales in another apartment leased for another purpose, nor against the lessor of such apartment, who is not shown to have received any remuneration for allowing such sales, and between whom and the plaintiff no privity exists.

Castaing v. New Orleans Improvement and Banking Company, 246.

II. Hire of Labor or Industry.

4. Where a clerk, employed at a fixed salary, for a year, is discharged, without sufficient cause, before the expiration of his time, he will be entitled to recover the whole amount which would be due at the end of his term.

Lartigue v. Peet, 91.

5. A tntress, employed for a term of years, at a yearly salary, who leaves her employer before the expiration of the term, on account of his failure to pay her salary either quarterly or annually, will not thereby forfeit the amount already due. The defendant's failure to pay released her from her contract. *Lefrançois v. Charbonnet*, 185.

MALICIOUS PROSECUTION.

In an action for damages for a malicious prosecution, a defendant may, under the general issue, offer in mitigation of damages, evidence of the circumstances calculated to show that he had just cause to suspect the plaintiff of the offence with which he was charged. All the circumstances attending the transaction tending to show the defendant's motives, ought to be inquired into. *Hitchcock v. North*, 328.

MANDAMUS.

1. A mandamus will be granted by a State court to compel obedience to an order of a District Court of the United States sitting in bankruptcy, directing a Recorder of Mortgages to erase certain mortgages.

Conrad v. Prieur, 49.

2. Where a Judge of Probates has rendered a judgment refusing to homologate the proceedings of a family meeting, he cannot be compelled by mandamus to do so. *State v. Judge of Probates of Jefferson*, 161.

MINOR.

1. The prescription of one year established by art. 2474 of the Civil Code, relates only to actions for a supplement of price on the part of the seller, or for a diminution of price or the cancelling of the contract by the buyer where there is room for an increase, or reduction of price, from excess or deficiency of measure. This prescription is an exception to that of five years, under art. 3507 of the same code, in relation to contracts in general. It runs against minors from the day of the sale, while that created by art. 3507 in relation to other contracts, commences only from their majority.

Sewell v. Willcox, 83.

2. When a minor has no ascendant in the direct line, the Probate Judge is not to appoint his presumptive heir, as tutor. C. C. 285. When there are relations who may claim the tutorship by the effect of law, or who are bound to accept the same, and the Judge is called upon to appoint a tutor from among them, the tutorship is a legal one, and he cannot appoint the presumptive heir, but must select the nearest of kin who comes after such presumptive heir or heirs. *Tutorship of Labarre*, 268.

3. It is only where a minor has no relations who may claim the tutorship by the effect of the law, or who are bound to accept the same, that there is room for a dative tutorship. C. C. 289. *Id.*

4. Where in an action against a tutor for a settlement of his accounts, plaintiffs moved that the account rendered by the tutor should be homologated so far as it was not opposed by certain creditors, they cannot be permitted afterwards to allege errors therein. By provoking the homologation, plaintiffs waived their right to oppose the account. *Norès v. Carraby*, 293.

5. The case must be a very strong one that will justify the removal of a parent

from the tutorship of child; on the ground of notorious bad conduct. It should not be done on light or doubtful testimony.

Tutorship of Kershaw, 488.

MORTGAGE.

I. Conventional Mortgages.

II. Tacit and Legal Mortgages.

III. Right of Mortgagee to Insure.

IV. Proceedings by Mortgagee after Death of Mortgagor.

V. Mortgages as affected by the Bankrupt Law of the United States of 19 August, 1841.

VI. Registry of Mortgages.

I. Conventional Mortgages.

1. Where two persons purchase jointly, each an undivided half of certain property, and give their notes endorsed by each other for the price, mortgaging the whole property to secure the payment of the whole price, on the sale of either half, the proceeds must be distributed proportionably among the holders of the different notes. The holder of the notes made by the purchaser whose half was sold, cannot claim the whole proceeds of his half of the property. *Gordon v. His Creditors, 47.*
2. Defendants purchased jointly certain lots of ground, giving their separate notes, payable at different periods, each for one-third of the price. The act of sale declared, that they were interested in the purchase in the same proportion; and provided "that to secure the payment of the aforesaid notes, the purchasers hereby mortgage the herein described property." Two of the purchasers having paid their notes, plaintiff obtained an order of seizure and sale, against the whole property, for the amount of the remaining note. *Held*, that the obligations of the purchasers, though in the same act, are as separate and distinct as if made by different contracts at different times, each purchaser being only bound for his third of the price; and that the notes of each were intended to be secured by a mortgage on his portion only of the property. *Erwin v. Greene, 70.*
3. Where the act of mortgage shows that a note secured by it was endorsed when the act was executed, and the note, with the endorsement on it, was delivered to the mortgagor by the mortgagee, the signature of the endorser need not be proved. *Succession of Porter, 96.*
4. The consent of the mortgagee to the sale of property mortgaged with the clause *de non alienando*, evidenced by joining in the act of sale, is a waiver of the right of the direct action, and he cannot afterwards proceed without notice to those who may have subsequently acquired rights. Any proceedings must be against the third possessors of the property.

City Bank of New Orleans v. Walton, 158.

5. A mortgage obtained by a creditor who knew of the insolvency of the debtor at the time, is null as to other creditors, so far as it gives the mort-

gatee any advantage over them, though executed more than three months before the failure. C. C. 1979. Where the only objection to such a contract is the undue preference, the action to rescind is prescribed by one year. *Prats v. His Creditors*, 298.

II. Tacit and Legal Mortgages.

6. Where a sheriff, by whom property has been sold under a first mortgage, pays over the surplus of the proceeds, remaining after its satisfaction, in discharge of subsequent general mortgages, binding on the defendant, he will not be liable to the latter, the act causing him no damage.

Powell v. Kellar, 272.

7. The legal mortgage of the wife on the property of the husband, to secure her paraphernal rights, or for the reimbursement of her paraphernal funds paid to him, or applied to the discharge of his debts, only attaches from the date of such payment or application, or from the time when her paraphernal property was placed under his administration, or in his possession.

Dimitry v. Pollock, 347.

8. A married woman has no mortgage on the real estate of her husband, for the reimbursement of money paid by her as his co-obligor *in solido*, where the law authorized her to join in the contract.

Arrieux v. Dugas,—*Rehearing*, 453.

9. Neither the wife with her legal mortgage and privilege on the property of her husband, nor any other person holding a general or special mortgage, though entitled to be paid by preference out of the proceeds, can prevent an inferior mortgagee from causing the property subject to his mortgage to be sold. C. C. 3245, 3249. C. P. 710, 713, 714, 715. Under arts. 396, 401 and 403 of the Code of Practice, a third person may oppose the payment of the price to the seizing creditor, when he claims a preference on the proceeds, and the court may order the amount to be retained by the Sheriff subject to its order. *Vanhille v. Her Husband*, 496.

10. A wife cannot claim the proceeds of property sold at the suit of a creditor of her husband, or exercise her action of mortgage against property in the hands of a third person, if the latter prove that there is other property subject to her lien in possession of the husband, or since sold, which she is bound to discuss. *Ib.*

III. Right of Mortgagees to Insure.

11. A mortgagee, or creditor having a lien on property, has an insurable interest. It makes no difference that a superior lien exist in favor of another, if anything remains for the insured. A lien, which is invalid, will not create an insurable interest; but it is sufficient, if it can be enforced between the contracting parties. Thus the interest of the mortgagee in an unrecorded mortgage, is an insurable one, though the mortgage would be without effect as to third persons. *Bell v. Western Marine and Fire Insurance Co.*, 423.

IV. Proceedings by Mortgagee after Death of Mortgagor.

12. Art. 986 of the Code of Practice, does not apply to a liquidated claim

- secured by a special mortgage. A mortgage creditor is not bound to bring a suit against the succession, before calling on the curator or administrator for the payment of the debt. A simple order from the Probate Judge is sufficient. *Succession of Porter*, 96.
13. Mortgage creditors of a succession, though it be insolvent, are not bound to wait; they may require the sale of the mortgaged property to be made for cash, provided its appraised value be obtained; and their wish must always prevail, in this respect, over that of the other creditors. C. C. 1163, 1663. C. P. 990, 991, 992, 995. *Ib.*
14. Where a Probate Judge orders the sale of mortgaged property to be made for cash, it is not necessary that he should insert in the order the condition imposed by law, that its appraised value be obtained. The law itself fixes the amount the property must bring, when the sale is for cash; and unless the appraised value be obtained there can be no adjudication. *Ib.*
15. A legatee of mortgaged property cannot require to be proceeded against as a third possessor, where it is not shown that she has been put in possession of the property. *Ib.*

V. *Mortgages as affected by the Bankrupt Law of the United States, of 19th August, 1841.*

16. The act of 19th August, 1841, contemplates, that all property surrendered by a bankrupt, whether incumbered, or not, shall be administered by the court before which the proceedings in bankruptcy are pending. A mortgagee, or other privileged creditor, does not impair his rights, by proving his debt before the bankrupt court. He cannot abstain from claiming under the bankruptcy, and proceed contradictorily with the assignee, to have the mortgaged premises sold to satisfy his debt. He must make himself a party to the proceedings in bankruptcy, and come in for his dividend under the act of Congress. *Clarke v. Rosenda*, 27.
17. The interest of persons holding mortgages or privileges under the laws of Louisiana on property surrendered by a bankrupt, is an adverse interest touching such property, and under sections 6 and 8 of the bankrupt law of 1841, the District Courts of the United States are vested with power to cite such persons, and to order the erasure of the mortgages and privileges, when necessary for the settlement of the bankrupt estate, and to do justice to the creditors; and it will be the duty of the Recorder of Mortgages under the State laws, to obey such order. *Conrad v. Prieur*, 49.
18. From the nature of the mortgages and privileges allowed by the laws of this State, no settlement of a bankrupt's estate on which such incumbrances exist, could ever be made without reducing the whole estate to cash; and this can only be done after the property has been released from the incumbrances. Such an estate can only be settled in a *concurso*, contradictorily between all the creditors. *Ib.*
19. By the laws of this State, both the possession and title of property subject to mortgage, whether conventional, legal, or judicial, remain in the debtor, and the mortgagees are to be paid, according to the dates of the registry of

each mortgages in the office of the Recorder of Mortgages, or of the acts giving rise to any legal mortgage, and the mortgage is but an accessory to a principal obligation, and is extinguished with it. C. C. 3374. Most of the privileges recognized by our laws are allowed in view of insolvency, and can be exercised only on the proceeds of the property surrendered by the debtor. By the laws of England, and of the other States of the Union, though regarded in equity as a mere security for the debt and only a chattel interest, a mortgage transfers the property itself, and vests the legal title in the mortgagee. Hence, while in England, and the other States, the equity or right of redemption alone passes to the assignee, here, all the property, whether subject to mortgages and privileges or not, becomes a part of the bankrupt's estate, subject to the disposition of the bankrupt court. *Id.*

20. A mandamus will be granted by a State court to compel obedience to an order of a District Court of the United States sitting in bankruptcy, directing a Recorder of Mortgages to erase certain mortgages. *Id.*

VI. Registry of Mortgages.

21. The neglect to record a judgment in the office of the Recorder of Mortgages, within ten days from the time it was rendered, as directed by the act of 26th March, 1813, does not prevent it from having the effect of a legal mortgage from the date of its registry, when made after the ten days have elapsed. *Lachomette v. Thomas*, 172.

NEW ORLEANS, CITY OF.

1. The interest of five per cent per annum, allowed to the City of New Orleans by section 23 of the act of 1st April, 1833, incorporating the Commercial Bank of New Orleans, is to be calculated on the surplus of the semi-annual dividends on the stock subscribed for by the City, remaining after the payment of the interest on the bonds given to the Bank by the City, and directed to be set apart as a sinking fund. It was not intended, that interest should be calculated on such surplus every six months, and be added thereto, so as to form new capital, bearing like interest. The Legislature did not intend to allow compound interest.

Mayor &c. of New Orleans v. Commercial Bank of New Orleans, 234.

2. Under the 4th section of the act of April, 1835, bonds or recognizances taken by a Recorder of any Municipality of the city of New Orleans, in a criminal matter, can only be recovered by the city attorneys for the use of the corporation. From the moment of forfeiture, the corporation was vested with the right to sue for their recovery. The Attorney General cannot enforce the payment of such a bond, in the name, and for the benefit of the State. An action for the recovery of the bond is a civil proceeding; and one cannot be permitted to sue to enforce obligations in which he has no interest. *State v. Desforges*, 253.

3. The 4th section of the act, of 1st April, 1835, appropriating to the city of New Orleans the amounts recovered on all bonds and recognizances taken by the associate Judges of the City Court, the Mayor, or Recorder, within

that city, for the public peace, or in criminal matters generally, and directing how they shall be sued on, was not repealed by the act of 11 March, 1837, chap. 73, providing for the support of the Charity Hospital. *Id.*

NEW ORLEANS, MASTER AND WARDENS OF PORT OF.

Under the act of the Legislative Council of the 31st of March, 1805, which created the offices of Master and Wardens of the Port of New Orleans, the tenure of those offices was at the will of the executive. That act conferred the power of appointment on the Governor alone, to be exercised as often as he should think necessary, and he alone was to be the judge of that necessity. The incumbent might be superseded, at any time, by a new appointment emanating from the Governor. The Legislature never having obeyed the injunction of section 8, article 6, of the Constitution, by determining the duration of the offices of Master and Wardens of the Port of New Orleans, the act of 1805 has continued in force, under section 4 of the schedule appended to the Constitution. The power conferred on the Governor by the act of 1805, of making new appointments to those offices whenever he shall deem it necessary, is not inconsistent with the provision of section 8, article 6, of the Constitution, authorizing the removal of public officers by an address of two-thirds of both houses of the Legislature. Both powers may be exercised concurrently. The Constitution has not repealed the act of 1805; it has only modified it so far as to require the concurrence of the Senate in making new appointments, and in superseding the incumbents. The question of the necessity of such appointments, is not one which the judiciary can assume to decide.

Nicholson v. Thompson, 367.

NEW TRIAL.

1. Where a cause has been tried by a jury, and no motion was made for a new trial, it must be an extreme case to induce the remanding of it.

Denton v. Murdock, 197.

2. It is no ground for a new trial, that a juror took up and looked over certain balance sheets, which had been rejected as inadmissible, in an action for the dissolution and settlement of a partnership, where the counsel of the party against whom they were offered, noticed the fact at the time but made no objection, and the papers were not taken by the jury into their room, and it was not shown that their contents were communicated to the other jurors, or that they did or could exercise any influence over the jury in making up their opinions. *Littlefield v. Beamis*, 145.

3. A party dissatisfied with the charge of the Judge to the jury, must require him to give his opinion in writing, and except to it before the jury retires; it cannot be done afterwards. *A fortiori*, is he precluded from making the charge a ground for a new trial, unless excepted to in due time. *C. P.* 517.

Penn v. Collins, 213.

NONSUIT.

Plaintiffs' counsel in an action to be tried by jury, left the court-room for a few minutes, after another jury case had been called, with the trial of which the court could not proceed for the want of a sufficient number of jurors, there being only five or six present, and attachments having been issued. During his absence their case was called, and the plaintiffs nonsuited. At the time of his return, a sufficient number of jurors had not yet arrived. On appeal: *Held*, that the plaintiffs should not have been nonsuited. *Per Curiam*. Had their counsel been present, he could not, in the language of art. 536 of the Code of Practice, *have pleaded their cause*, no jury having been formed; nor could the defendant, for the same reason, have tried the case *ex parte*.

Buchanan v. Locke, 211.

NOTARY.

1. The acts of foreign notaries do not prove themselves, except as to the protests of foreign bills of exchange. *Rosine v. Bonnabel*, 164.
2. A notary who has given a certificate, in his official character, will not be listened to as a witness to prove its falsehood. *Mathews v. Boland*, 200.

NULLITY OF JUDGMENT.

See JUDGMENT, 1, 5, 9.

OFFENCES AND QUASI-OFFENCES.

1. An action to recover a drawback due on certain articles subject to an import duty, and for the value of merchandize detained from the plaintiff, is not an action for the recovery of damages for an offence or quasi-offence, in the meaning of the third section of the act of 14th March, 1839, ch. 17, establishing the Commercial Court of New Orleans; but is within the jurisdiction of that court. C. C. 2294 to 2304. *Gove v. Breedlove*, 78.
2. Though a defendant may have acted without malice, yet, if his conduct has been marked by great imprudence, and a want of due regard for the rights and feelings of the plaintiff, he will be responsible to the latter, for whatever damage his conduct has caused. C. C. arts. 1928, No. 3, 2294, 2295.
Kernan v. Chamberlin, 116.
3. In an action against defendants, for damages on account of an injury done to plaintiff's boat by a steamer alleged to belong to the former, who pleaded the general issue, proof that defendants were owners of the steamer, is necessary to a recovery; and where the omission of evidence of ownership was attributable to the oversight of the plaintiff's attorney, the case will be remanded to obtain such proof. *Riley v. City of Louisville*, 184.
4. Though the drawer of a bill may be discharged from his obligation to pay it, by the neglect of the holder to have it presented at the place of payment

and protested, and to have notice given thereof, on the ground of the damage he is presumed to have sustained by the *laches* of the latter, yet, if he afterwards withdraws from the hands of the drawee the funds on which he had drawn, he will be responsible, under art. 2294 of the Civil Code, to the holder, who had become the owner thereof, for the amount.

Keith v. Mackey, 277.

5. The owner of a slave, hired to another and drowned while employed, with the consent of his master, in a work not proved to have been of a dangerous character, cannot recover his value. *Hudson v. Grout*, 409.
6. A stake-holder who pays over the amount bet on a horse-race, without the sanction of a majority of the judges of the race, will be responsible to the winner. *Dauterive v. Broussard*, 516.

PARTNERSHIP.

1. The owners of a steamer employed in carrying freight and passengers for hire, are responsible as partners and common carriers, *in solido*, for any loss of property confided to them, occasioned for want of care or skill in those in charge of the boat. *Kelly v. Benedict*, 138.
2. Art. 2818 of the Civil Code, which requires the contract by which a partnership *in commendam* has been created, to be recorded in the office of the Recorder of Mortgages, within six days from the time of its execution, is directory only. The omission to record the contract within that period, will not subject the partner *in commendam* absolutely to all the responsibilities of an ordinary partner towards third persons. So long as the contract is unregistered, he will be liable as an ordinary partner to the creditors of the partnership; but it is otherwise as to those who may contract with the partnership after such registry, whenever made; they being notified of the extent of his responsibility. Notice to third persons is the principal object of the registry. Art. 2819. *Lachomette v. Thomas*, 172.
3. By the French law, a partner, *in commendam*, is viewed as a simple furnisher of funds, liable to the partnership, but not to third persons. The creditors have no direct action against him, in their own name, though they may compel him to pay whatever he may owe to the acting partners, by exercising the rights of the latter against him, under art. 1166 of the Code Napoleon. *Id.*
4. After the dissolution of a partnership, none of the partners can use the social name so as to bind the rest; nor can the latter be bound by any acknowledgment of a debt, or account, so made by the others. *Id.*

PHYSICIAN.

1. Where plaintiff, who had been employed by defendant as a physician, sues for the value of his services, and defendant pleads that plaintiff was not licensed to practice, the burthen of proving that he was not authorized will be on the defendant, he having employed the plaintiff as such.

Dickerson v. Gordy, 480.

2. Persons practicing as physicians without having been licensed as required by law, can claim no compensation for their services. *Ib.*

PLAQUEMINES, ROADS AND LEVEES IN PARISH OF.

See ROADS AND LEVEES.

PLEADING.

- I. *Parties to Actions.*
- II. *Of the Petition.*
- III. *Actions where to be brought.*
- IV. *Exceptions and Answer.*
- V. *Demands in Reconvention.*
- VI. *Opposition of Third Persons.*
- VII. *Admissions, and Answers to Interrogatories.*
- VIII. *Agreements between Parties or Counsel.*

I. *Parties to Actions.*

1. No action whatever, executory or ordinary, can be maintained against a bankrupt, regularly discharged under the act of Congress of 19th August, 1841, for a debt contracted previous to his bankruptcy, where the plaintiff was placed on the list of creditors filed in compliance with the act. The action must be against the assignee.

City Bank of New Orleans v. Walton, 158.

2. There is a difference between the obligations of co-heirs, and of joint obligors by contract. The law apportions among the heirs, all the charges of the inheritance, and each heir may, perhaps, be sued, separately, for his virile share. C. P. 120. C. C. 1370, *et seq*; *aliter* as to co-obligors by joint contract, all of whom must be sued together. C. C. 2080 *et seq*. In the one case, it is a condition of his inheritance that each heir shall pay his share of the debt; but, in the other, no one of the obligors can release himself at will. *Duggan v. De Lizardi*, 324.

3. In actions on joint obligations, all the original parties must be sued together even those who may have performed their part; no judgment can be pronounced, unless it be shown that all joined in the obligation; any judgment must be against each defendant separately for his portion, but, *in solido*, for the costs. (C. C. 2080 *et seq*;) and all the parties below must be made parties to the appeal, though a part only have appealed, or the appeal must be dismissed. Those who have not appealed must be cited as appellees.

Ib.

4. Where one stipulates in a sale that his vendee shall pay to his vendor a balance of the price yet due, the original vendor may be viewed as merely *adjectus solutionis gratia*—entitled to receive, but not to sue for the amount. Not being a party to the contract, he will not be bound by its stipulations,

and may continue to look to his own vendee for payment; while, on the other hand, the parties to the agreement may annul it. But if he, in whose favor such a stipulation is made, consents to avail himself of it, he thereby makes himself a party to the contract, which cannot afterwards be revoked without his assent; and he may sue to recover the amount thus stipulated in his behalf. *Mitchell v. Cooley*, 240.

5. Doubts as to the construction of a contract cannot avail one, who not being a party thereto, can base his right to sue in his own name, only on a clear and unequivocal stipulation in his behalf. *Ib.*

6. In an action in the name of the State to recover the penalty of a bond taken for the appearance of one of the obligors, the defendants may urge, for the first time, after appeal, that nothing became due to the State by its forfeiture. *Per Curiam*. Such an objection is not based on the mere incapacity to sue, which must be specially denied, but, tending to show the absolute want of any legal right in the State, may be taken advantage of at any stage of a cause. It goes to show that the plaintiff has no interest in the subject matter of the suit, and that the right of action does not belong to the party who seeks to enforce it. *State v. Desforbes*, 253.

7. The word "actual" in art. 43, of the Code of Practice, which requires that a petitory action must be brought against the person in actual possession of the immovable, does not mean strictly a natural or corporeal possession, in the sense of arts. 3391, 3393, of the Civil Code. It applies to a civil, as well as to a natural possession, where the defendant pretends to possess as owner. The civil possession of the defendant at the time of suit, preceded by an actual corporeal detention of the property, will suffice.

Barnes v. Gaines, 314.

8. An exception by the garnishees, in a suit against a corporation existing in another State, filed after issue joined, that the plaintiffs did not make certain assignees or trustees of the corporation, under a deed of assignment, parties to the action, will be disregarded where it does not appear that the plaintiffs were parties to the deed, or that they, or the garnishees had notice of the assignment of the debt attached, previous to the institution of the suit, and neither the corporation, nor its assignees ask to be heard.

Bean v. Mississippi Union Bank, 333.

9. The assignee of a bankrupt under the act of Congress, of 19th August, 1841, may come into the State courts, for the purpose of protecting the interests confided to him. *Harrod v. Burgess*, 449.

10. One acting as an agent, may sue in his own name for the recovery of the amount of a draft drawn by himself, and accepted by the debtor of his principals. *Johnson v. Brashear*, 477.

II. Of the Petition.

11. The character of an action depends upon the prayer for judgment.

Lagay v. Chieusse, 139.

12. To recover of the owners of a steamer, as common carriers, the value of property lost or destroyed by them, it is sufficient to allege that the defend-

ants undertook as carriers to convey the property for hire, and failed to do so. Any specification of the acts, or neglect which occasioned the loss, may be regarded as surplusage, and can furnish no ground for excepting to the petition as uniting distinct causes of action—a cause *ex contractu*, with one *ex delicto*. *Kelly v. Benedict*, 138.

13. The proceedings by a plaintiff, against a sheriff, to make him responsible, on the ground of his having illegally released the defendant from arrest, or of having neglected to seize and sell the property of the latter, must be by a regular action, and not by rule. Arts. 766 and 767, of the Code of Practice, which authorize any one entitled to money received by a sheriff, in virtue of an order or judgment of court, to proceed against that officer by motion, do not apply to such a case. *Dussin v. Delaroderie*, 202.

14. It is not to be expected that a plaintiff can describe in his petition with great accuracy the debts, or forms of the obligations between his debtor and the garnishees in an attachment suit. He has not, in many cases, the necessary information to enable him to do so.

Bean v. Mississippi Union Bank, 333.

III. Actions, where to be brought.

15. The master and owner of a steamer plying between the port of New Orleans, and the different towns on the Mississippi, or its tributary streams, must be sued in the parish proved by witnesses to be that of his domicile; and this, though he may have declared, in the enrolment of his boat, taken out before the inception of the suit, that his usual place of residence is in the place where the action was brought. *Ricard v. Kimball*, 142.

16. Petitory actions, or actions of revendication, must be brought before the ordinary tribunals, even when instituted against successions. C. P. 963.

Barnes v. Gaines, 314.

IV. Exceptions and Answer.

17. Where the petition of a married woman alleges, that she is authorized by her husband to sue, proof of authorization will only be required when specially denied *in limine litis*. *Succession of Porter*, 96.

18. An exception to the sufficiency of the description in the petition of the notes sued on, will be overruled, where the notes themselves are annexed to the petition for reference.

D'Inwilliers v. Second Municipality of New Orleans, 123.

19. Action by a tenant against his lessors, for damages for a disturbance, in his enjoyment of the premises. Defendants excepted to the petition, denying any disturbance, but averring if there had been any, it did not proceed from them, or from those over whom they had any control, or for whose acts they could be held responsible. The exception having been sustained below, and the suit dismissed, on an appeal by plaintiff: *Held*, that the plea of defendants was rather an answer to the merits, than an exception, and that the court erred in dismissing the suit, without a trial on the issues made up between the parties.

Castaign v. New Orleans Improvement and Banking Company, 177.

20. Every means of defence, such as payment, release, novation, &c., which goes to show the extinguishment of an obligation admitted, or proved to have once existed, must be pleaded specially, and cannot be urged under the general issue, which only denies the facts alleged in the petition. The plaintiff might otherwise be taken by surprise. *New Orleans Gas Light and Banking Co. v. Hudson*, 486.

21. A plea of release not made in the lower court, will not be listened to by the Supreme Court. This defence will be presumed to have been waived. *Ib.*

V. *Demands in Reconvention.*

22. Where the object of an action is to establish that defendant, a builder, has been paid for the work done by him under a contract with plaintiff, and to procure its erasure from the books of the Recorder of Mortgages, defendant may claim in reconvention a balance due to him, under another contract, for buildings and materials constructed on the same lot. *Percy v. Peyroux*, 179.

VI. *Opposition of third Persons.*

23. The assignee of a bankrupt, under the act of 19th August, 1841, who claims the interest of the latter in a suit, may file a third opposition, for the purpose of asserting the rights of the creditors whom he represents. C. P. 396. *Vidal v. Ocean Insurance Company*, 68.

24. One making a third opposition is not required to make an oath in order to obtain an injunction. C. P. 399. *Ib.*

VII. *Admissions and Answers to Interrogatories.*

25. The president and directors of a bank have no authority, without the consent of the stockholders, to confess a forfeiture of the charter. But where, in their answer to an application on the part of the State for such forfeiture, they do not deny the grounds of forfeiture set forth in the petition, they must be taken to be true, and a forfeiture decreed accordingly.

State v. Atchafalaya Rail Road and Banking Company, 63.

26. Where in an action against a tutor for a settlement of his accounts, plaintiffs moved that the account rendered by the tutor should be homologated so far as it was not opposed by certain creditors, they cannot be permitted afterwards to allege errors therein. By provoking the homologation, plaintiffs waived their right to oppose the account. *Noris v. Carrady*, 292.

27. Where a party to an action is ordered to answer in open court, interrogatories propounded to him by the opposite party, and the latter fails to have a day fixed for answering them, they cannot, on the failure of the former to answer, be taken for confessed. C. P. 351. *Derbes v. Décuir*, 401.

VIII. *Agreements between Parties or Counsel.*

28. All agreements between parties or counsel, derogating from the rules of practice fixed by law, must be entered on the minutes of the court, or reduced to writing and filed in the record, or they will not be noticed.

Coffin v. Pollard, 124.

POLICE JURY.

1. The assent of a Police Jury to the emancipation of a slave, is not an ordinance requiring the signatures of the President and Clerk on the journal to give it validity, in the meaning of the seventh section of the act of 20th March, 1816, relative to the organization and powers of police juries.

Fanchonette v. Grangi, 510.

2. It is not essential to the validity of the acts of a Police Jury that the daily journal should be attested by the president and secretary. The 7th sect. of the act of 20th March, 1816, is directory to the officers of such bodies, and their neglects of duty cannot be allowed to prejudice persons having no power to control or direct them. *Ib.*

3. The assent of a Police Jury is only necessary to the emancipation of a slave, when under thirty years of age. Act 31 January, 1827. Such assent when the slave is thirty years of age, is only necessary to relieve the master from giving bond to remove the slave so emancipated out of the State within one month. Acts of 16 March, 1830, and 25 March, 1831. *Ib.*

PORT WARDENS.

See NEW ORLEANS, MASTER AND WARDENS OF PORT OF.

POSSESSION.

See PLEADING, 7.

PRESUMPTION.

See EVIDENCE, XII.

PRESCRIPTION.

1. The prescription of one year established by art. 2474 of the Civil Code, relates only to actions for a supplement of price on the part of the seller, or for a diminution of price or the cancelling of the contract by the buyer, where there is room for an increase, or reduction of price, from excess or deficiency of measure. This prescription is an exception to that of five years, under art. 3507 of the same code, in relation to contracts in general. It runs against minors from the day of the sale, while that created by art. 3507 in relation to other contracts, commences only from their majority.

Sewell v. Willcox, 83.

2. A mortgage obtained by a creditor who knew of the insolvency of the debtor at the time, is null as to other creditors, so far as it gives the mortgagee any advantage over them, though executed more than three months before the failure. C. C. 1979. Where the only objection to such a contract is the undue preference, the action to rescind is prescribed by one year.

Prats v. His Creditors, 288.

3. The acknowledgment of a debt by an agent, will stop prescription. C. C. 3486. *Greig v. Muggah*, 473.

PRIVILEGE.

1. The act of 19th August, 1841, contemplates, that all property surrendered by a bankrupt, whether incumbered, or not, shall be administered by the court before which the proceedings in bankruptcy are pending. A mortgagee, or other privileged creditor, does not impair his rights, by proving his debt before the bankrupt court. He cannot abstain from claiming under the bankruptcy, and proceed contradictorily with the assignee, to have the mortgaged premises sold to satisfy his debt. He must make himself a party to the proceedings in bankruptcy, and come in for his dividend under the act of Congress. *Clarke v. Rosenda*, 27.
2. The interest of persons holding mortgages or privileges under the laws of Louisiana on property surrendered by a bankrupt, is an adverse interest touching such property, and under sections 6 and 8 of the bankrupt law of 1841, the District Courts of the United States are vested with power to cite such persons, and to order the erasure of the mortgages and privileges, when necessary for the settlement of the bankrupt estate, and to do justice to the creditors; and it will be the duty of the Recorder of Mortgages under the State laws, to obey such order. *Conrad v. Prieur*, 49.
3. From the nature of the mortgages and privileges allowed by the laws of this State, no settlement of a bankrupt's estate on which such incumbrances exist, could ever be made without reducing the whole estate to cash; and this can only be done after the property has been released from the incumbrances. Such an estate can only be settled in a *concurso*, contradictorily between all the creditors. *Ib.*
4. By the laws of this State, both the possession and title of property subject to mortgage, whether conventional, legal, or judicial, remain in the debtor, and the mortgagees are to be paid, according to the dates of the registry of such mortgages in the office of the Recorder of Mortgages, or of the acts giving rise to any legal mortgage, and the mortgage is but an accessory to a principal obligation, and is extinguished with it. C. C. 3374. Most of the privileges recognized by our laws are allowed in view of insolvency, and can be exercised only on the proceeds of the property surrendered by the debtor. By the laws of England, and of the other States of the Union, though regarded in equity as a mere security for the debt and only a chattel interest, a mortgage transfers the property itself, and vests the legal title in the mortgagees. Hence, while in England, and the other States, the equity or right of redemption alone passes to the assignee, here, all the property, whether subject to mortgages and privileges or not, becomes a part of the bankrupt's estate, subject to the disposition of the bankrupt court. *Ib.*
5. The consignees of a vessel are entitled to take charge of goods shipped by her, on which they have a lien for freight, drayage, and the expenses of storing. The best means of notifying the owner, is by advertising them. *Deaver v. Bedford*, 245.

6. Where a factor or merchant accepts a bill on the faith of produce consigned to him, it must be considered as an advance on it, and he has, for the amount thereof, the same privilege as though the advance had been made in money; and other creditors, who have no privilege, cannot take the property from him, without paying his advances. *Lambeth v. Turnbull*, 264.
7. Where property has been shipped to consignees entitled to a privilege thereon, so that the consignor or owner cannot take it out of their hands without paying their claims, a creditor of the owner cannot attach. *Ib.*
8. A creditor of a consignor, who has attached property of his debtor in the hands of a consignee, who claims a privilege for acceptances made by him on the faith of the consignment, must show, in order to take the property out of the hands of the latter without paying the amount of his acceptances, that the acceptances were not made in good faith, and that the consignee is not bound to pay them. *Ib.*
9. A mortgagee, or creditor having a lien on property, has an insurable interest. It makes no difference that a superior lien exist in favor of another, if anything remains for the insured. A lien, which is invalid, will not create an insurable interest; but it is sufficient, if it can be enforced between the contracting parties. Thus the interest of the mortgagee in an unrecorded mortgage, is an insurable one, though the mortgage would be without effect as to third persons. *Bell v. Western Marine and Fire Insurance Company*, 423.
10. Where the policy on a steamer, obtained by the owner, does not prohibit him from selling, he can do so without forfeiting it, if the insurers are not thereby put in a worse situation; and where he retains a mortgage, or a privilege thereon as vendor, he will have an insurable interest, and may recover on the policy. It is not necessary that the interest at the time of the loss, should be the same as that existing when the policy was obtained. *Ib.*
11. The vendor of a steamer, or other vessel has a privilege on the thing sold, in the same manner as the vendor of other property. *C. C. 3204, sec. 8. Ib.*

PROHIBITION.

The writ of prohibition is one of the means given to the Supreme Court to enable it to exercise its appellate jurisdiction; and it may be issued either before, or after judgment. *C. P. 845, 846.* Where judgment has been rendered by a judge not having jurisdiction, and process has issued, the order is to be directed to the party prosecuting and to the officer. *C. P. 853.*

Clarke v. Rosenda, 27.

PUBLIC DOMAIN.

- I. *Public Domain in Louisiana and Florida under the Spanish Government.*
- II. *Public Lands of the United States.*

I. Public Domain in Louisiana and Florida under the Spanish Government.

1. The Spanish Governor of the province of Louisiana, Miro, was invested with the power of granting lands within the province. The Marquis de Casa Calvo, a subsequent Governor, had no such authority, the power of disposing of the public domain having been conferred, in October, 1798, on the Intendant, but the Governor still retained his other civil functions, and was the highest judicial officer in the province. *Murdock v. Gurley*, 457.
2. The Spanish provinces of Florida and Louisiana were under the jurisdiction of the Captain General of Cuba; but the Governor of Louisiana was always recognized as having authority over the Governor of West Florida and as having power to grant lands in that province. *Id.*

II. Public Lands of the United States.

3. The penalty, or forfeiture imposed by the 4th sect. of the act of Congress of the 25th April, 1812, relative to claims to lands in that part of Louisiana east of the river Mississippi and the island of Orleans, on persons claiming under the French, British, or Spanish Governments, who may fail to cause the written evidence of their claims to be recorded in the manner directed by that act, cannot be invoked by parties having no grant from the United States to the land in controversy. *Murdock v. Gurley—application for re-hearing*, 467.
4. The provision of the same section declaring that no grant, order of survey, deed, conveyance, or other written evidence, which shall not be recorded as directed by that act, shall be admitted as evidence in any court of the United States, against any grant which may be derived from the United States, establishes a rule of evidence for the courts of the United States; but the rule has no binding authority over the courts of the States. *Id.*
5. A confirmation of a land claim by the United States, amounts only to a relinquishment of all claim thereto on its part. *Id.*

QUASI-CONTRACTS.

1. One who has been employed by the partners in liquidating the affairs of a commercial partnership, cannot claim a commission in the value of goods divided in kind among the partners; but he is entitled to a compensation proportioned to the trouble to which he was subjected in making such division. *Gillett v. Deranco*, 13.
2. Where, after the resignation of his appointment, an attorney who had been employed at an annual salary, continues, with the approbation of his former clients, his attention to the suits which originated during his term of office, and his services are shown to have been useful to them, he may recover compensation therefor.

Carter v. Second Municipality of New Orleans, 238.



QUASI-OFFENCES.

See OFFENCES AND QUASI-OFFENCES.

RACING.

See ALEATORY CONTRACTS.

RECONVENTION.

See PLEADING, V.

RECORDER OF MORTGAGES.

See MORTGAGE.

REDHIBITORY ACTION.

See SALE, VI.

REGISTRY.

1. Art. 2818 of the Civil Code, which requires the contract by which a partnership in *commendam* has been created, to be recorded in the office of the Recorder of Mortgages within six days from the time of its execution, is directory only. The omission to record the contract within that period, will not subject the partner in *commendam* absolutely to all the responsibilities of an ordinary partner towards third persons. So long as the contract is unregistered, he will be liable as an ordinary partner to the creditors of the partnership; but it is otherwise as to those who may contract with the partnership after such registry, whenever made; they being notified of the extent of his responsibility. Notice to third persons is the principal object of the registry. Art. 2819. *Lachomette v. Thomas*, 172.
2. So, the neglect to record a judgment in the office of the Recorder of Mortgages, within ten days from the time it was rendered, as directed by the act of 26th March, 1813, does not prevent it from having the effect of a legal mortgage from the date of its registry, when made after the ten days have elapsed. *Id.*

RESCISSION, ACTION OF.

See SALE, VI.

RES JUDICATA.

1. Action for compensation for services rendered as attorney in fact for de-

- defendants, in recovering the amount of a succession. Plaintiff had previously presented his claim in the form of an opposition to the account filed by the executor, to the Court of Probates before which the succession was opened, and judgment had been rendered against him. The exception of *res judicata* being pleaded, founded on this judgment: *Held*, that the exception should be overruled. *Per Curiam*. The Court of Probates has jurisdiction of claims against the estates of persons deceased; but the plaintiff's was against the defendants, for services rendered after the death of their ancestor. *Mallard v. Borges*, 15.
2. A judgment rendered in another State against a defendant not a resident of that State, is not admissible in evidence against him, unless it be shown, that he was cited, or had appeared. Without service of citation, or appearance, a judgment is, *per se*, of no effect. *McNairy v. Bell*, 418.
 3. The statute of the State of Tennessee, authorizing sureties who have paid the debt of their principal, to obtain judgment against the latter, by motion, without notice to him, and on the verdict of a jury convened to try the fact of suretyship, can only operate, within that State, on citizens or residents thereof. It cannot empower citizens of that State to obtain judgments against non-residents. *Id.*
 4. To give to a court, in any case, jurisdiction of the person, the party must have had due notice of the suit. *Id.*

ROADS AND LEVEES.

The act of 13th March, 1837, ch. 94, relative to the roads, and levees, in front of the property of non-residents in the parish of Plaquemines, providing a summary mode of disposing of the property of absent proprietors, the proceedings under it should be closely scrutinized.

Jeannin v. Millaudon, 76.

RULE OF COURT.

The party interested in establishing that a rule of an inferior court has been violated, must show its existence by the record. *Denton v. Murdock*, 137.

RULE TO SHOW CAUSE.

1. A rule having been taken on the surety in an attachment bond to show cause why he should not pay the amount of the judgment against his principal, the former, on the return day of the rule, demanded to see the bond, which, having been misplaced, could not be produced: and the parties separated, the rule not having been discharged, made absolute, or extended. Judgment having been afterwards rendered in favor of the plaintiff in the rule, without further notice to defendant, in an action by the latter to annul: *Held*, that a new rule should have been taken, and that the judgment must be annulled. *McKeever v. Keyes*, 61.

2. A rule to show cause requires no other citation than the notification of the rule. The party against whom it is taken is bound to answer it, within the time fixed, and no judgment by default is necessary to render it absolute, which may be done on the day fixed for its trial. *Succession of Porter*, 96.
3. A rule in the Court of Probates on an executrix, to show cause why mortgaged property should not be sold for cash, taken by the mortgagor, is a summary case, the trial of which is provided for by arts. 1034, 1035 of the Code of Practice. *Ib.*
4. The proceedings by a plaintiff, against a sheriff, to make him responsible, on the ground of his having illegally released the defendant from arrest, or of having neglected to seize and sell the property of the latter, must be by a regular action, and not by rule. Arts. 766 and 767 of the Code of Practice, which authorize any one entitled to money received by a sheriff, in virtue of an order or judgment of court, to proceed against that officer by motion, do not apply to such a case. *Dussin v. Delaroderie*, 203.
5. The owner of an unliquidated claim against a succession, cannot obtain judgment therefor, by a rule to show cause taken against the administrator. The action must be brought in the ordinary manner, before the Court of Probates in which the succession was opened. *Succession of Jacobs*, 270.

SALE.

- I. *Form and Requisites of a Sale.*
- II. *Warranty.*
- III. *Obligations of Vendee.*
- IV. *Putting Vendee in Default.*
- V. *Actions for Supplement or Diminution of Price when Prescribed.*
- VI. *Rescission on account of Redhibitory Defects, Frauds, &c.*
- VII. *Privilege of Vendor.*
- VIII. *Judicial Sales.*

I. *Form and Requisites of a Sale.*

1. One claiming under a bill of sale, signed by an attorney in fact of the vendor, must prove the authority of the attorney. *Wells v. McMaster*, 154.
2. Where one stipulates in a sale that his vendee shall pay to his vendor a balance of the price yet due, the original vendor may be viewed as merely *adjectus solutionis gratia*—entitled to receive, but not to sue for the amount. Not being a party to the contract, he will not be bound by its stipulations, and may continue to look to his own vendee for payment; while, on the other hand, the parties to the agreement may annul it. But if he, in whose favor such a stipulation is made, consents to avail himself of it, he thereby makes himself a party to the contract, which cannot afterwards be revoked without his assent; and he may sue to recover the amount thus stipulated in his behalf. *Mitchell v. Cooley*, 340.

3. Doubts as to the construction of a contract cannot avail one, who, not being a party thereto, can lose his right to sue in his own name, only on a clear and unequivocal stipulation in his behalf. *Id.*

4. Where one stands by, and sees his property sold under legal process, without making his claim known, or objecting thereto, he will be bound by the sale. *Bench v. McDonough*, 359. *Marsh v. Smith*, 518.

5. A husband living with his wife in a house belonging to her, and attending with her to a retail shop kept in the same building, sold the contents of the shop to her in part payment of paraphernal funds received by him. *Held*, that these facts proved a sufficient delivery.

Larochette v. Her Husband, 496.

II. Warranty.

6. The vendor may be bound in warranty, at least for the restitution of the price, though there be no stipulation to that effect, unless, being aware of the danger, the vendee purchased at his own risk. C. C. 2491.

Jeannin v. Millaudon, 76.

7. Where, by the terms of a sale, the vendor undertakes to procure a certificate from the Recorder of Mortgages showing that no incumbrances exist on the property, before the vendee is to be required to pay, the court will not order the price to be paid, even into court, before the production of such a certificate, though it should be proved that the incumbrances might be paid off out of the price. To do so, would be to alter the contract.

Sewell v. Willcox, 83.

8. Where cotton, sold by the bale, does not correspond with the samples, by reason of some defect or vice unknown to the vendee at the time of delivery and acceptance, he will be entitled, even when there is no fraud, to recover the difference between the price, and the value of the article as affected with the defects and vices existing at the time and place of delivery; as well as the charges necessarily incurred in a foreign port, to which it is shipped, in consequence of discovering that it was falsely packed, and of inferior quality. *Stiff v. Nugent*, 217.

9. In an action, by the purchaser, for damages in consequence of the inferiority of the article to that of the samples by which it was sold, interest may be recovered, at five per cent, from judicial demand, but not from the date of the purchase. *Id.*

10. The commencement of a suit for freedom by a slave sold by plaintiff to defendants, cannot justify the latter in withholding the price, nor is it ground for annulling the sale. All that defendants can require is security for the title, or for reimbursement for the price in case of eviction.

Carson v. Dwight, 484.

11. In an action for the price of a slave, resisted on the ground of a suit for freedom having been instituted by such slave, for the purposes of justice the court may order a stay of execution till security be given against the danger of eviction, though not prayed for in the answer, and even though there be no prayer by defendant for general relief. *Id.*

12. A vender who fails to comply with his obligation to release a mortgage on the property sold, and thereby impedes or prevents its resale, or subjects his vendee to unnecessary expense, or the title to doubt, will be responsible in damages. *Wilkins v. Bassett*, 492.

III. Obligations of Vendee.

13. Defendants purchased jointly certain lots of ground, giving their separate notes, payable at different periods, each for one-third of the price. The act of sale declared, that they were interested in the purchase in the same proportion; and provided "that to secure the payment of the aforesaid notes, the purchasers hereby mortgage the herein described property." Two of the purchasers having paid their notes, plaintiff obtained an order of seizure and sale, against the whole property, for the amount of the remaining note. *Held*, that the obligations of the purchasers, though in the same act, are as separate and distinct as if made by different contracts at different times, each purchaser being only bound for his third of the price; and that the notes of each were intended to be secured by a mortgage on his portion only of the property. *Ervin v. Greene*, 70.
14. Proof of the promise of a purchaser at an auction sale, to pay any loss that may result from a resale of the property on his account, and of his authority to the auctioneer to do the best he could with the property, will dispense with the evidence which would otherwise be necessary in ordinary case of sale *à la folle enchère*. *Forsyth v. Wilkinson*, 263.

IV. Putting Vendee in Default.

15. Defendant sold plaintiff property, the price to be paid as soon as certain mortgages thereon should be cancelled. The mortgages not being removed, the latter notified the former that unless they were cancelled, within a given time, he would sue to annul the contract, but made no offer (*offre labiale*) to pay the price. *Held*, that the vendee was not legally put in default—C. C. 1907; and that as no time was mentioned in the contract within which the mortgages were to be cancelled, the putting of the vendee in default, was an indispensable pre-requisite to the rescission of the contract on the ground of his failure to comply with his obligation to cancel them. *Ib.* 1906.
- Sevell v. Willcox*, 83.
16. To recover in an action for the difference between the price for which a slave was sold to the defendant, and that subsequently obtained on a sale made at the purchaser's risk, on his failure to comply with the terms of the first sale, where there is a general denial, plaintiff must prove that defendant was put in mora before the second sale. *Petit v. Laville*, 117.

V. Actions for Supplement or Diminution of Price, when Prescribed.

17. The prescription of one year established by art. 2474 of the Civil Code, relates only to actions for a supplement of price on the part of the seller, or for a diminution of price or the cancelling of the contract by the buyer, where

there is room for an increase, or reduction of price, from excess or deficiency of measure. This prescription is an exception to that of five years, under art. 3507 of the same code, in relation to contracts in general. It runs against minors from the day of the sale, while that created by art. 3507 in relation to other contracts, commences only from their majority.

Sewell v. Willcox, 83.

VI. Rescission on account of Redhibitory Defects, Fraud, &c.

18. Where a purchaser at a credit sale, availed himself of the privilege of paying cash, on being allowed a deduction at the rate of eight per cent per annum, from the price of such advance, this circumstance will not entitle him, on obtaining a rescission of the sale, to claim interest at that rate.

Doulin v. New Orleans and Nashville Rail Road Company, 5.

19. Where the vendor remains in possession of the thing sold, it will be presumed that the sale was simulated; and, with respect to third persons, the parties must prove that they are acting in good faith, and establish the reality of the sale. C. C. 2456. *Bell v. Dowly*, 18.

20. The purchaser of bank stock, which, according to the usage of the bank, could only be transferred to him on his compliance with certain forms, cannot annul the sale, where he has failed to put the vendor in default, after placing himself in a condition to receive the transfer by complying with the regulations of the bank. *Jones v. Siddle*, 65.

21. In an action for a rescission of a purchase made by plaintiffs of defendant's interest in a partnership existing between them, as to the value of which they were deceived by the fraudulent representations of the latter, for a dissolution of the partnership on account of fraud, and for an account: *Held*, that the main issue between the parties being one of fraud, a document showing exorbitant and unfair charges by plaintiffs for merchandize furnished by them to the partnership, was admissible in evidence under the issue.

Littlefield v. Beamis, 145.

22. To succeed in a redhibitory action, the purchaser must have taken such care of the thing sold, as might be expected from a prudent father of a family. *Soubie v. Sougernon*, 148.

23. Action to rescind the sale, and recover the price of a slave alleged to be affected with a redhibitory disease. On the trial it was proved, that the slave was sent by plaintiff to a hospital about fifteen months after the institution of the suit, in a dying condition, where she expired six or seven days after. There was no evidence, that she had ever been attended by a physician. *Held*, that it is not enough to show the existence of the disease, at the time of the sale; that to enable the plaintiff to recover, it should have been shown, that the slave had received proper medical treatment. *Id.*

24. To recover in a redhibitory action, the purchaser must prove that the alleged vice or malady existed before the sale to him, unless it makes its appearance within the three days immediately following the sale; in which case, it will be presumed to have existed before. C. C. 2508.

Fox v. Walsh, 222.

VII. Privilege of Vendor.

25. Where the policy on a steamer, obtained by the owner, does not prohibit him from selling, he can do so without forfeiting it, if the insurers are not thereby put in a worse situation; and where he retains a mortgage, or a privilege thereon as vendor, he will have an insurable interest, and may recover on the policy. It is not necessary that the interest at the time of the loss, should be the same as that existing when the policy was obtained.

Bell v. Western Marine and Fire Insurance Co., 423.

26. The vendor of a steamer, or other vessel has a privilege on the thing sold, in the same manner as the vendor of other property. C. C. 3304, sec. 8. *Id.*

VIII. Judicial Sales.

27. An opposition by a mortgage creditor, to the homologation of a sheriff's sale was dismissed, though no proof had been adduced of the publication of the monition. The monition, being subsequently published, and proved, a judgment of homologation was rendered. The opponent, having appealed from the judgment of dismissal, *Held*, that being an hypothecary creditor, the appellant had sufficient interest to make opposition; that the court erred in dismissing his opposition, without evidence that the monition had been published; and that the judgment of homologation subsequently rendered cannot prejudice him, though it may be conclusive as to others.

Fortier v. Zimpel, 189.

28. The obligation of the plaintiff in a *fi. fa.*, to refund to the purchaser on his eviction, the money received by the former, is merely statutory, (C. P. 711, *et seq.*) and it cannot be extended further than to the reimbursement of the price paid by the purchaser, and received by the plaintiff, or which might have been received by him but for his own neglect; but the purchaser may recover from the defendant in the execution, the whole sum paid by him. He is entitled to a joint action against both the parties to the execution—against the plaintiff, for the amount received by him, and against the defendant, for the whole sum paid.

Cleary v. Second Municipality of New Orleans, 247.

SENATE.

See GOVERNOR AND SENATE.

SERVITUDE.

- The use which the owner has intentionally established on a particular part of his property in favor of another part, is equal to a title, with respect to perpetual and apparent servitudes thereon. C. C. 763.

Barlon v. Kirkman, 18.

SHERIFF.

1. The proceedings by a plaintiff, against a sheriff, to make him responsible, on the ground of his having illegally released the defendant from arrest, or of having neglected to seize and sell the property of the latter, must be by a regular action, and not by rule. Arts. 706 and 767, of the Code of Practice, which authorize any one entitled to money received by a sheriff, in virtue of an order or judgment of court, to proceed against that officer by motion, do not apply to such a case. *Dussin v. Delaroderie*, 202.
2. Where a sheriff, by whom property has been sold under a first mortgage, pays over the surplus of the proceeds, remaining after its satisfaction, in discharge of subsequent general mortgages, binding on the defendant, he will not be liable to the latter, the act causing him no damage.

Powell v. Kellar, 272.

SHIPPING.

1. The consignees of a vessel, who receive goods belonging to a third person residing in another place, and re-ship them by a steamer to him, will not be responsible for any loss resulting from a fortuitous event, as the snagging of the steamer, where compensation is claimed only on the ground, that the goods should have been reshipped sooner, and not for the omission to insure. *Deaver v. Bedford*, 245.
2. The consignees of a vessel are entitled to take charge of goods shipped by her, on which they have a lien for freight, drayage, and the expenses of storing. The best means of notifying the owner, is by advertising them. *Id.*
3. Where the policy on a steamer, obtained by the owner, does not prohibit him from selling, he can do so without forfeiting it, if the insurers are not thereby put in a worse situation; and where he retains a mortgage, or a privilege thereon as vendor, he will have an insurable interest, and may recover on the policy. It is not necessary that the interest at the time of the loss, should be the same as that existing when the policy was obtained. *Bell v. Western Marine and Fire Insurance Co.*, 423.
4. The vendor of a steamer, or other vessel has a privilege on the thing sold, in the same manner as the vendor of other property. C. C. 3204, sec. 8.

Id.

See SLAVES.

SLANDER.

1. In an action for slander, malice need not be expressly proved; it may be implied. *Kernan v. Chamberlin*, 116.
2. Though a defendant may have acted without malice, yet, if his conduct has been marked by great imprudence, and a want of due regard for the rights

and feelings of the plaintiff, he will be responsible to the latter, for whatever damage his conduct has caused. C. C. arts. 1928, No. 3; 2394, 2395. *Ib.*

SLAVES.

1. The act of 25th March, 1840, chap. 80, relative to the transporting of slaves out of the State, against the will of their owners, applies to all slaves received on board of a steamer, or other vessel within the State, without the written consent of their owners, wherever the latter may reside, whether in, or out of this State. *Feltus v. Anders*, 7.
2. Under the first section of the act of 25th March, 1840, the testimony of a witness employed on any steamer or other vessel, on board of which a slave shall have been found, without the written consent of his or her owner, is inadmissible to destroy the legal presumption, established by that act, that the master and owners have received, or hidden, or suffered such slave to remain on board with the intention of depriving the owner thereof, or of transporting him or her out of the State, or from one part thereof to another; but it is admissible to disprove any statements in relation to the facts out of which this presumption grows, such as the finding of the slave on board, the taking from some point within the State, &c. *Ib.*
3. The act of 25th March, 1840, chap. 80, amending the acts previously in force relative to the transportation of slaves out of the State, against the will of their owners, is one of great severity, and must be strictly construed. *Winston v. Foster*, 113.
4. The presumption created by the first section of that act does not exist, where a runaway slave, concealed on board of a vessel, is discovered by the captain, and not by the owner of the slave, and the former pursues the course pointed out by law, for restoring the slave to his owner, and the latter actually recovers possession of him. *Ib.*
5. Where a slave, concealed on board a vessel, is carried away and lost to the owner, the master and owners of the vessel will be responsible for his value, though he was received on board by a person employed on the vessel, contrary to the orders, and without the knowledge of the master and owners thereof. The latter are answerable for the damage occasioned by the acts of those they employ, and cannot excuse themselves on the plea, that they were done contrary to their orders, and without their knowledge. C. C. 2399. *Ib.*

SPANISH GOVERNMENT OF LOUISIANA.

1. The Spanish Governor of the province of Louisiana, Miro, was invested with the power of granting lands within the province. The Marquis de Casa Calvo, a subsequent Governor, had no such authority, the power of disposing of the public domain having been conferred, in October, 1798, on the Intendant, but the Governor still retained his other civil functions, and was the highest judicial officer in the province. *Murdock v. Gurley*, 459.

2. The Spanish provinces of Florida and Louisiana were under the jurisdiction of the Captain General of Cuba; but the Governor of Louisiana was always recognized as having authority over the Governor of West Florida, and as having power to grant lands in that province. *Ib.*

STATUTES.

I. *Statutes of the United States.*II. *Statutes of the State.*III. *Statute of Tennessee.*I. *Statutes of the United States.*

- 1800, April 4. Bankruptcy. *Clarke v. Rosenda*, 27.
 1812, April 25, § 4. Relative to claims to lands in Louisiana, east of inland of New Orleans. *Murdock v. Gurley*—Application for Re-hearing, 467.
 1819, March 3. Adjusting land claims in district east of inland of New Orleans. *Murdock v. Gurley*, 457.
 1834, May 20. Regulating practice in Courts of the United States in Louisiana. *Garrard v. Reed*, 506.
 1838, July 7. Relative to vessels propelled by steam. *Kelly v. Benedict*, 138.
 1841, August 19. Bankruptcy. *Clarke v. Rosenda*, 27. *Vidal v. Ocean Insurance Company*, 68. *City Bank of New Orleans v. Walton*, 159. *West v. His Creditors*, 261. *Harrod v. Burgess*, 449.

II. *Statutes of the State.*

- 1805, March 31. Creating master and wardens of port of New Orleans. *Nicholson v. Thompson*, 367.
 1807, March 9. Emancipation of slaves. *Mathews v. Boland*, 200.
 1812, September 5. Power of appointing to office. *Nicholson v. Thompson*, 367.
 1813, March 20. —————. *Ib.*
 ————— 26. Recording of certain acts. *Lachomette v. Thomas*, 172.
 1816, February 13, § 5. Transporting slaves out of the State, against will of owner. *Winston v. Foster*, 113.
 —, March 16. License to practice as Physician. *Dickerson v. Gordy*, 489.
 ————— 20, § 7. Organization and powers of Police Juries. *Funcheonette v. Grangé*, 510.
 1817, February, 18. License to practice as Physician. *Dickerson v. Gordy*, 489.
 1820, March 1. —————. *Ib.*
 1825, February 19. Organizing City Court, and repealing acts creating

- Justices of the Peace and constables for New Orleans.
Nicholson v. Thompson, 367.
- 1827, January 31. Emancipation of slaves. *Mathews v. Boland*, 200.
 —, March 24. —————. *Ib. Fanchonette v. Grangé*,
 510.
- 1828, March 25. Amending Civil Code and Code of Practice—commission
 to take testimony. *Hallock v. Caruthers*, 190.
- 1830, March 16. Emancipation of slaves. *Mathews v. Boland*, 200. *Fan-*
chonette v. Grangé, 510.
- 1831, March 25. —————. *Ib. Ib.*
- 1832, April 2. Incorporating Union Bank of Louisiana. *Arrieux v. Dugas*,
Rehearing, 457.
- 1833, April 1. Incorporating Commercial Bank of New Orleans—§ 21, 23.
Mayor &c. of New Orleans v. Commercial Bank of New Or-
leans, 234: — § 37. *Second Municipality of New Orleans*
v. Sane, 151.
- 1835, April 1, § 4. Bonds and Recognizances taken in New Orleans. *State*
v. Desforges, 253.
- 2. Bonds and Recognizances in Criminal Cases. *Ib.*
- 1837, January 31. Emancipation of slaves. *Fanchonette v. Grangé*, 510.
 —, February 28. Authentication of Foreign Documents. *Rosine v. Bon-*
nabel, 163.
- , March 11. Providing for support of Charity Hospital. *State v. Des-*
forges, 253.
- Bonds and Recognizances in Criminal Cases. *Ib.*
- 13. Roads and Levees in Plaquemines. *Jeannin v. Millaudon*,
 76.
- 1839, March 14. Establishing Commercial Court of New Orleans. *Gove v.*
Breedlove, 78.
- 1840, March 25. Transporting slaves out of the State against will of owner.
Feltus v. Anders, 7. *Winston v. Foster*, 113.
- 1841, February 10, § 17. Trial by Jury in the District Parish, and Commer-
 cial Courts in New Orleans. *Guillotte v. Thomp-*
son, 141.
- 1842, February 5, § 7. Reviving Charters of Banks in New Orleans. *State*
v. Atchafalaya Rail Road and Banking Co., 63.
- , March, 26. Roads and Levees in Concordia. *State v. Desforges*, 253.

III. Statute of Tennessee.

Authorizing sureties who have paid debt of principal to obtain judgment against
 the latter by motion, without notice, on mere verdict of jury as to fact of
 suretyship. *McNairy v. Bell*, 418.

SUBROGATION.

1. The conventional subrogation in favor of a third person, from whom the
 creditor has received payment, must be expressed, and made at the time of

the payment. C. C. 2156. Facts going to show the unexecuted intention of the parties, will not suffice. *Harrison v. Bisland*, 204.

2. One who binds himself unconditionally, or furnishes money, for the payment of a debt, does not thereby entitle himself to the right of the creditor who is thus paid. A legal subrogation exists in favor, not of all who pay a debt, but only of those who, being bound for it, discharge it. *Id.*
3. Legal subrogation results from the payment of a bill of exchange, or promissory note, by an endorser, though made before maturity. The endorser is included in the third paragraph of art. 2157 of the Civil Code, he being bound with, or for the maker or acceptor, and the article referring to all obligations whatever, whether absolute or conditional.

Wiggin v. Flower, 406.

4. The provision of art. 2130 of the Civil Code, which declares, that "an obligation may be discharged by any person concerned in it, such as a co-obligor or a security," recognizes the right of a co-obligor, surety, or any person, like them, concerned in the obligation, to pay, before his obligation becomes absolute; and the subsequent clause of the same article, which provides that payment by a person in no way concerned in the obligation does not give rise to subrogation, virtually declares that payment by a co-obligor, surety, or other person concerned in it, does create such subrogation. *Id.*
5. The rights of a surety subrogated to those of a creditor, whether payment was made before the obligation of the surety became absolute, or after, result from his original contract with his principal, and are restrained by it. Those of an endorser, not for accommodation, in the same situation, are under no restraint from his original contract with the maker, or acceptor, to wit, that the whole amount of the bill should be paid to him, or his order. *Aliter*, as to an accommodation endorser, who, being viewed as a surety, will be restricted to the sum actually paid by him. *Id.*
6. Plaintiffs accepted a bill payable at a future period, which was endorsed by the payee to third persons, by whom it was endorsed to a Bank, which discounted the bill in their favor. The latter having paid the bill, before maturity, in notes of the Bank, which were under par, claimed the whole amount of the bill from the acceptors. *Held*, that plaintiffs did not, by the endorsement and discount of the bill, and the subsequent depreciation of the notes of the Bank, acquire *ipsis factis*, any more than an inchoate and incomplete right to pay in such depreciated notes, not being parties to any act or contract from which such a right might result; that not having manifested any intention to avail themselves of the advantage which the depreciation of the Bank notes offered, until, by the payment of the bill, the endorsers had acquired the rights of the Bank thereto, plaintiffs were in the same situation in which they would have been, had the Bank transferred the note at any time after its discount; and that, by their acceptance, plaintiffs bound themselves to pay to the order of the payee, the whole amount of the bill, that the endorsers became entitled thereto by the transfer of the bill, that the Bank acquired their rights by the discount, and that, the endorsers,

by the payment of the bill, acquired a legal subrogation to the rights of the Bank. *Ib.*

See SURETY, 2.

SUBSTITUTION.

1. Clauses in a will limiting the testatrix's power to dispose of the legacies after their reversion to herself, are nugatory, and do not amount to a substitution. *Barnes v. Gaines*, 314.
2. Where a testatrix directed by her will "that in case any of the legatees should die before her, the share of the deceased legatee shall go to his children, their heirs or assigns," and this direction was not changed by her, after the death of the legatee: *Held*, that this clause does not contain a substitution; that the death of either of the legatees before the testatrix, could not prevent her from disposing of her property as she pleased in favor of any other persons; and that the right of the legatee, first instituted, not having accrued, the children, the eventual legatees, would take under the will, without reference to the previous institution. *Ib.*

SUCCESSIONS.

- I. *Jurisdiction in matters of Succession.*
- II. *Of Executors.*
- III. *Of Heirs and Legatees, and of the Acceptance of Successions.*
- IV. *Claims against Successions.*
- V. *Sale of Property of Successions.*
- VI. *Tableau of Distribution, and payment of Debts and Legacies.*

I. *Jurisdiction in matters of Succession.*

1. Where a party has been put in possession of a succession, as testamentary heir, by a decree of the Court of Probates, that court is divested of all control over the estate; and one who claims the property as the heir at law of the deceased, must proceed before the courts of ordinary jurisdiction. Nor is it requisite, before instituting such revendicatory action, that the claimant should be recognized as heir by the Probate Court; this is only required while the succession continues under the supervision of the court by which the executor, administrator, or curator was appointed. *Layre v. Pasco*, 9.
2. Petitory actions, or actions of revendication, must be brought before the ordinary tribunals, even when instituted against successions. C. P. 983.
Barnes v. Gaines, 314.

II. Of Executors.

3. The commission of two and a half per cent allowed to executors by art. 1676 of the Civil Code, cannot be claimed on the value of waste, uncultivated land. Such land cannot be considered as a part of the productive property of the succession. *Succession of Milne*, 48.
4. Neither the validity of a will under which a plaintiff holds the appointment of a testamentary executor, nor the certificate of his appointment from the Court of Probates, can be inquired into collaterally, in a controversy between the executor and a debtor of the succession represented by him. The court cannot look beyond the certificate of his appointment, or letters testamentary; and until the will be regularly annulled, which cannot be done in the absence of those having an interest under it, he will be entitled to exercise the powers conferred on him by law. *Maskell v. Roupel*, 500.

III. Of Heirs and Legatees, and of the Acceptance of Successions.

5. The State can only take a succession where there is no one entitled to the inheritance, or where it is not claimed by any one having a right thereto. C. C. 477, 911, 917, 923. Such was the case under the code of 1808, and under the Spanish laws. *Layre v. Pasco*, 9.
6. Natural brothers and sisters will inherit from each other, where their father and mother died before the child from whom the estate descends. C. C. 917. Article 923 of the Civil Code does not exclude the idea of natural brothers and sisters being entitled to inherit. It must be construed with reference to the preceding articles. Arts. 923 and 917 must be regarded as one continuous act of legislation *in pari materia*. *Ib.*
7. Where one claims, as the heir of his mother, against a third person in possession, property which belonged to the community of *acquits* existing between his parents, he must show that his father had such a title, at the dissolution of the community, as would have enabled him, in his own right and as tutor of his son, to maintain a petitory action for the property; for if any contracts or engagements were entered into by the father, during the existence of the community, which were binding on him, showing that his apparent title was not a real one, whether evidenced by private writings shown to exist, and proved by extrinsic evidence to have a real date, or by authentic acts, they must have been binding on the community, and descended to the heir of the wife as a necessary burden upon his inheritance, estopping him from disturbing a title derived from the community.
Caldwell v. Hennen, 20.
8. A legatee of mortgaged property cannot require to be proceeded against as a third possessor, where it is not shown that she has been put in possession of the property. *Succession of Porter*, 96.
9. There is a difference between the obligations of co-heirs, and of joint obligors by contract. The law apportions among the heirs, all the charges of the inheritance, and each heir may, perhaps, be sued, separately, for his virile share. C. P. 190. C. C. 1370, *et seq*; *aliter* as to co-obligors by

joint contract, all of whom must be sued together. C. C. 2080 *et seq.* In the one case, it is a condition of his inheritance that each heir shall pay his share of the debt; but, in the other, no one of the obligors can release himself at will. *Duggan v. De Lizardi*, 224.

10. The assumption of the quality of heir in an authentic act, is an unconditional acceptance of the succession. C. C. 982. *Greig v. Muggah*, 473.

IV. Claims against Successions.

11. Art. 986 of the Code of Practice, does not apply to a liquidated claim secured by a special mortgage. A mortgage creditor is not bound to bring a suit against the succession, before calling on the curator or administrator for the payment of the debt. A simple order from the Probate Judge is sufficient. *Succession of Porter*, 96.
12. Unliquidated claims against a succession, need not be presented to the administrator for his approbation, before commencing an action therefor. C. P. 984, 986. *Succession of Jacobs*, 270.
13. The owner of an unliquidated claim against a succession, cannot obtain judgment therefor, by a rule to show cause taken against the administrator. The action must be brought in the ordinary manner, before the Court of Probates in which the succession was opened. *Ib.*

V. Sale of Property of Successions.

14. Mortgage creditors of a succession, though it be insolvent, are not bound to wait; they may require the sale of the mortgaged property to be made for cash, provided its appraised value be obtained; and their wish must always prevail, in this respect, over that of the other creditors. C. C. 1163, 1663. C. P. 990, 991, 992, 995. *Succession of Porter*, 96.
15. Where a probate Judge orders the sale of mortgaged property to be made for cash, it is not necessary that he should insert in the order the condition imposed by law, that its appraised value be obtained. The law itself fixes the amount the property must bring, when the sale is for cash; and unless the appraised value be obtained, there can be no adjudication. *Ib.*
16. A rule in the Court of Probates on an executrix, to show cause why mortgaged property should not be sold for cash, taken by the mortgagor, is a summary case, the trial of which is provided for by arts. 1034, 1035 of the Code of Practice. *Succession of Porter*, 96.

VI. Tableau of Distribution, and Payment of Debts and Legacies.

17. No part of the property or funds of a succession should be applied to the discharge of legacies, until the creditors are satisfied. *Succession of Porter*, 96.
18. The usual publication in the newspapers, calling on all whom it may concern, to show cause, if any they can, why a tableau of distribution of the effects of a succession should not be homologated, is sufficient notice. No citation, or actual notice is necessary. *Arrieux v. Dugas*, 453.

SUMMARY PROCEEDINGS.

1. The act of 13th March, 1837, ch. 94, relative to the roads, and levees, in front of the property of non-residents in the parish of Plaquemines, providing a summary mode of disposing of the property of absent proprietors, the proceedings under it should be closely scrutinized. *Jeannin v. Millaudon*, 76.
2. A rule in the Court of Probates on an executrix, to show cause why mortgaged property should not be sold for cash, taken by the mortgagee, is a summary case, the trial of which is provided for by arts. 1034, 1035 of the Code of Practice. *Succession of Porter*, 96.

SURETY.

1. Suretyship must be stipulated expressly. It cannot be presumed. C. C. 3009. *Ervin v. Greene*, 70.
2. Where the lessors of property, without the consent of the sureties of the lessees, take back a part which had been occupied by the lessees as a dwelling, and relet it to a third person, the sureties will be released, the contract being materially altered without their assent. *Per Curiam*. It must be presumed, that the sureties consented to bind themselves in relation to the situation of the whole property at the time of the lease, and in consideration of the subrogation to which they were legally entitled to the lessors' rights and privileges, among others, upon the furniture which existed in the dwelling house. C. C. 2675, 2676, 2677, 2679, 3030. *Penn v. Collins*, 213.
3. Where the lessors of property, having sued the lessees for the rent due, and to come due under the contract, and caused property, on which they had the lessors' privilege, to be seized to an amount equal to the rent due, and to come due, abandon the seizure without a trial, the sureties of the lessees will be discharged. *Id.*
4. Though the obligation of an endorser or surety cannot be enforced till after the event on which it becomes absolute, it exists from the time when it was contracted, for it is susceptible of being compromised, released or transferred, and of passing to heirs, &c. So the rights of the endorser, or surety, against the maker or principal, exist before the obligation of the former becomes absolute. *Wiggin v. Flower*, 406.
5. The provision of art. 2130 of the Civil Code, which declares, that "an obligation may be discharged by any person concerned in it, such as a co-obligor or a security," recognizes the right of a co-obligor, surety, or any person, like them, concerned in the obligation, to pay, before his obligation becomes absolute; and the subsequent clause of the same article, which provides that payment by a person in no way concerned in the obligation does not give rise to subrogation, virtually declares that payment by a co-obligor, surety, or other person concerned in it, does create such subrogation. *Id.*
6. Endorsers and sureties are, under the Civil Code, conditional obligors of the creditor of the maker and principal, and at the same time, conditional creditors of the latter. Though no conservatory acts can be exercised

against the conditional debtor by endorsement, until his obligation becomes absolute, both the endorser and the surety, may, under art. 2037 of the Civil Code perform all acts conservatory of their respective rights, even before their own obligations have become absolute. *Ib.*

7. A surety can claim nothing more than indemnification. *Ib.*
8. The rights of a surety subrogated to those of a creditor, whether payment was made before the obligation of the surety became absolute, or after, result from his original contract with his principal, and are restrained by it. Those of an endorser, not for accommodation, in the same situation, are under no restraint from his original contract with the maker, or acceptor, to wit, that the whole amount of the bill should be paid to him, or his order. *Aliter*, as to an accommodation endorser, who, being viewed as a surety, will be restricted to the sum actually paid by him. *Ib.*
9. Ordinary endorsers are not placed on the same footing as sureties; nor can they, like the latter, claim the benefit of discussion. *Ib.*
10. The statute of the State of Tennessee, authorizing sureties who have paid the debt of their principal, to obtain judgment against the latter, by motion, without notice to him, and on the verdict of a jury convened to try the fact of suretyship, can only operate, within that State, on citizens or residents thereof. It cannot empower citizens of that State to obtain judgments against non-residents. *McNairy v. Bell*, 418.
11. The interest of the party by whom property is held as security, is an insurable one. Hence the right of agents, consignees and factors, to insure the goods of their principals.

Bell v. Western Marine and Fire Insurance Company, 423.

12. Where a debtor has made a *cessio bonorum*, all his debts, whether payable then or at a future period, are placed on the same footing, the latter being reduced in proportion to the distance of the day of payment. All the creditors, including those whose debts were payable at a future time, are entitled to a voice in fixing the terms of sale; nor will the consent of a creditor to the sale of the property on a credit, be considered an extension of the time of payment, so as to release others bound with the insolvent as endorsers or sureties. *Légér v. Arcenaux*, 513.

SURVEY.

Natural and well ascertained objects must control in the location of claims to land. Specified courses and distances must yield to them, if they cannot be reconciled. *Le Breton v. Lewis*, 479.

THIRD PERSONS.

Neither the wife, nor her heirs, are third persons as to the husband, in relation to acts done by him as the head of the community. Domestic papers admissible against the husband, are so against the wife, or her heirs.

Caldwell v. Hennen, 20.

TRUST.

Nothing in the laws of this State prohibits a party from holding in his own name lands belonging to another, subject to the order of the latter. Such an arrangement has no analogy to the *fidei-commissa* abolished by the Civil Code. By the latter, the trustee is bound to retain for, and deliver to a third person, the thing confided to him, which is placed beyond the control of the person creating the trust. *Caldwell v. Hennen*, 20.

VERDICT.

See JURY, 1, 8.

WARRANTY.

See SALE, III.

WILL.

See DISPOSITIONS MORTIS CAUSA.

END OF VOLUME V.

ERRATA.

Page 13, line 7 from bottom, for *liquidation* substitute *liquidating*.

" 15, " 6 from top, for *him, exception*, substitute *him*. *The exception*.

" 141, " 9 " " *a jury*, substitute *the court*.

" 169, " 11 from bottom, for 697, substitute 897.

" 177, " 10 from top, for *in*, substitute *on*.

" 227, " 4 " " 208, substitute 2080.

" 353, " 8 from bottom, for 2175 and 2176, substitute 2675 and 2676.

" 367, " 9 from top, for *section 6, article 8*, substitute *article 8, section 6*.

